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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 745

PAUL DE LUCIA,

v.

UNITED STATES OF AMERICA

Petition

FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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APPENDED
Opinion of United States Court of Appeals.

McCORMICK & HENDERSON, INC., CHICAGO, ILL.

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To the Honorable Earl Warren, Chief Justice of the United States and Associate Justices of the Supreme Court of the United States.

May it please the Court:

The petition of Paul De Lucia respectfully shows to this Honorable Court:

I.

The Opinion of the Court Below.

The opinion of the Court of Appeals rendered December 31, 1958, has not yet been reported. It appears in this record and has been copied in the Appendix. (Herein p. 163)

II.

Jurisdiction.

The date of the judgment to be reviewed is December 31, 1958. Our Petition for Rehearing was denied February 4, 1959. Jurisdiction to issue the writ is found in the provisions of Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925. (28 U.S.C.A., Sec. 1254) Based on Title 28 U.S.C. 1940 ed. §§ 346 and 347 (Mar. 3, 1911, c. 231, §§ 239, 240, 36 Stat. 1157; Feb. 13, 1925, c. 229 § 1, 43 Stat. 938; Jan. 1, 1928, c. 14, § 1, 45 Stat. 54; June 7, 1934, c. 426, 48 Stat. 926) (from Revisor's Note Title 28 U.S.C.A. Judiciary and Judicial Procedure § 1254 p. 42.)

III.

Questions Presented.

1.

Can a conviction be sustained in a net worth case where the Court of Appeals makes a general finding that a starting point and a likely source has been proved and the evidence shows no such proof?

2.

Where the prosecutor claims that proof of starting point and source is not necessary because of an alternative method and this claim is fortified by the instructions given at the request of the Government, may the Court of Appeals disregard the fact that there is no evidence to support any alternative method and affirm on the ground that that Honorable Court is of the opinion that the net worth method of proof has been sufficient?

3.

Where the evidence shows, without dispute, that petitioner expended more money during the year 1950 than he could have had available, if he were limited to reported income for that year, leaving the question open as to whether the excess expenditures came from current income or from funds previously accumulated, is the opinion of an expert, as to the amount of cash available at the end of 1948 founded on hearsay, sufficient to establish a starting point in a net worth case?

4.

Where it appears that in 1945 the Agents realized that the hearsay evidence in the hands of the Government might not be sufficient to support the civil claim made and as a result a compromise was made, can the Agent's Report, based on hearsay without other evidence, be used in a criminal trial held in 1958, in order to establish the amount of money received, where it has then become necessary in the criminal case to prove that only part of the money originally claimed to have been obtained was received?

5.

In a net worth case, is proof of a source of income said to have been unreported for 1950 necessary, after it is made to appear in evidence that petitioner has paid taxes on all of the income received by him during 1950 and that he had no source other than the sources appearing in his records and reflected in his returns?

6.

In a net worth case when it appears that the opinion of an expert as to a starting sum of available cash at the start is based upon hearsay, that the expert has assumed facts not in evidence and has arbitrarily rejected portions

of the cross-examination of witnesses for the Government, should not the Court have directed acquittal, it appearing that the opinion of this expert is the only evidence of a starting point?

7.

After the Government has relied upon hearsay evidence upon which to base the opinion of an expert that petitioner had received a certain sum of money in prior years, should the prosecutor be permitted to prove denials made by petitioner out of court as to the receipts of this extortion money, merely to make an unfounded claim that the denials were false?

8.

Where in a net worth case the jury has found guilt on three counts and the Court of Appeals reverses as to two counts, on the ground that evidence concerning the statements of others was used against petitioner, should not the affirmance on the third count be reversed, when it appears that the same error contributed to the conviction on the third count?

9.

In a net worth case where the prosecutor has adopted a theory based upon the use of statements made by others, fortified by instructions given at the request of the Government and the Court of Appeals has found that it was error to make use of the testimony used as a base of this theory, should not the conviction be reversed?

10.

In a net worth case where an instruction given at the request of the Government takes important questions of fact from the jury and the Court decides the questions of fact against petitioner as matters of law, should not the judgment be reversed?

11.

In a net worth case, may a prosecutor be permitted to shift the burden to the defendant by means of argument and instructions given at his request, in the absence of having proved essentials of the case for the Government?

12.

Where it appears from the evidence that the Court of Appeals has misconceived the issues and has held that a jury question was created, when no such question existed, should the conviction stand?

13.

The Court of Appeals having reversed as to two counts and the jury having acquitted as to a conspiracy count and it appearing that the Court of Appeals held that the District Court erred in the matter of the application of rules of evidence, should not the case be remanded for new trial on the remaining count, instead of affirmance without remand?

14.

In a net worth case where it appears that the evidence was insufficient, confusion was created by the manner of presentation, that errors were committed concerning rules of evidence and errors were made as to the giving and refusing of instructions, plus an improper closing argument by the prosecutor, should not a conviction be reversed?

15.

The District Judge inspected certain statements *in camera* and held that they could be of no value to the defense. These papers were sealed and transmitted to the

Court of Appeals where it was held that no error had been committed. On review here we present four questions as follows:

(1) If § 3500 had not been enacted would it have been error for the Court to refuse to require delivery of the papers on the ground stated, *i.e.*, that they could have been of no value to the defense?

(2) If the answer to (1) is yes, the question arises, was it error to refuse, after application of § 3500?

(3) If it would have been error under the *Jencks* case and not error under § 3500, has Congress the Constitutional power to change the practice in the light of that decision?

(4) In view of the fact that the Government was obliged to prove the materiality of certain statements and the Court took this question from the jury by instruction, after an inspection *in camera*, does not this amount to conviction on evidence not heard or seen by petitioner?

16.

Where the Government seeks to punish for evasion of income taxes and proves as a part of its case that a defendant had made money by illicit means, is it proper for the prosecutor and the Court to denounce the defendant because of the manner in which his income had been obtained and to put him on trial for law breaking in general?

17.

Were the verdicts inconsistent where the jury by acquittal found that there had been insufficient evidence to prove a vital element necessary in the remaining counts?

18.

The Court gave a supplemental instruction at the request of the Government after the jury had retired. Petitioner objected to the language used. The question submitted is—did this instruction prejudice petitioner, being argumentative in favor of the Government?

IV.

Statutes Involved.

Any person who wilfully attempted in any manner to evade or defeat any tax imposed, or the payment thereof, shall be guilty and punished in accordance with the requirements of the statute. Section 145 (b) Internal Revenue Code of 1939; 26 United States Code, Section 145 (b).

On September 2, 1957, Chapter 223 of Title 18 U.S.C. was amended by adding the following to § 3500.

(c) If the United States claims that any statement ordered to be produced under this Section contains matter which does not relate to the subject matter of the testimony of the witness, the court shall order the United States to deliver such statement for the inspection of the court *in camera*. Upon such delivery the court shall excise the portions of such statement which do not relate to the subject matter of the testimony of the witness. With such material excised, the court shall then direct delivery of such statement to the defendant for his use. If, pursuant to such procedure, any portion of such statement is withheld from the defendant and the defendant objects to such withholding, and the trial is continued to an adjudication of the guilt of the defendant, the entire text of such statement shall be preserved by the United States and, in the event the defendant appeals, shall be made available to the appellate court for the purpose of determining the correctness of the ruling of the trial judge. • • •

V.

Summary Statement of Matter Involved.

Petitioner was found guilty by a jury on the first three counts of a four count indictment. The fourth count charged petitioner and Joseph Bulger, a lawyer, with conspiracy to make the false statements alleged in two of the previous counts. The jury acquitted both defendants on Count IV.

Counts I and II (2)* charged petitioner with violation of § 7201, in that petitioner made and caused to be made to the Revenue officials false statements concerning the existence of a $300,000 cash hoard, allegedly kept by petitioner in his home. The false statements were said to have been made for the purpose of concealing additional unreported income for 1948 and 1949. The statute of limitations had run on those years, so the charge was founded on these false statements made in 1954. The evidence showed without dispute that petitioner had made no statement, true

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*These numbers direct the attention of Your Honors to the Appendix, in three volumes, which Appendix contains references to pages of the record on file, thus (2). A transcript of all of the proceedings was made and filed by the Official Court Reporter, referred to as (Tr. 2). As the trial progressed, daily copy was furnished the Court, the prosecution and the defense. This transcript and all of the exhibits were certified to the Court of Appeals and have been sent here by that Honorable Court. The Court of Appeals had a complete record of all that took place below. That record was fully printed for use in the Court of Appeals and such printed record, has been certified to this Honorable Court. Petitioner having claimed in the Court of Appeals that the evidence was insufficient and this being a circumstantial evidence case, all of the evidence relating to De Lucia was printed. The Government filed an appendix, page numbers are referred to this by (G. 2).

or false. The statement about the $300,000 was made in the testimony given by Mr. Bulger before Assistant Regional Counsel King, (455) and mentioned in conferences with lawyers. It was also alleged that a false statement was made before Special Agent Smith when petitioner appeared, accompanied by his lawyers. (406) The theory of the Government, approved by the District Judge expressed in the instructions and in refusing to allow a motion for acquittal, was that although petitioner had made no statement, the false statements made during the investigation by and in the presence of lawyers for petitioner constituted evidence against DeLucia. The Court of Appeals held that there was a failure of proof necessary to make petitioner responsible for that said by others. Consequently, that Honorable Court held that the District Court erred in denying petitioner's motion for judgment of acquittal on Counts I and II.

Judgment was affirmed as to Count III charging violation of § 145 (b) Internal Revenue Code of 1939, 26 U.S.C. § 145 (b) by filing a false return for 1950.

Much of the evidence was stipulated. Petitioner stood on his motion for acquittal. He introduced no evidence before the jury. On appeal, no question was raised as to the credibility of any witness. The reliability of expert opinion was questioned by counsel for petitioner. Petitioner was on parole during the indictment years. He had furnished monthly reports, based upon books kept by his tax lawyer for that purpose. The Government did not question the accuracy of the books or parole reports as to the matters there recorded. The only dispute arose over the fact that petitioner in his books and on his report credited himself with money designated as having been drawn from "funds on hand."

The Government claimed that the proof showed that in fact this money came from current income. There was no question but what expenditures exceeded income for the indictment years. If in fact petitioner was in possession of $300,000, when he came out of the penitentiary on parole, there had been enough money on hand at the end of 1947 to meet expenditures for 1948, 1949 and 1950.

The Government put in evidence about the $300,000, in order to attempt to prove that DeLucia had had no such amount. The Government proved that petitioner had testified, in 1950, before the Kefauver Committee that he had $300,000 when he came out of the penitentiary. The Government was unable to prove that DeLucia did not have $300,000 as stated. The prosecutor claimed that he had shown the falsity of this testimony by proof of the financial history of petitioner, plus the opinion of experts that at the beginning of 1948 DeLucia could not have had more cash available than $48,697.01. This was proved, if at all, by the net worth method. Petitioner questioned the reliability of the charts and the expert opinions on the ground that the Government evidence on its face showed that there had been no proof of a starting point. Agent Ruggaber (245) compiled his report (Exhibit 55, p. 245) in 1945 from a printed transcript of testimony given in a New York prosecution, where DeLucia had been one of the defendants. This report was compiled for the purpose of a 90 day letter sent to petitioner while he was in the penitentiary. The claim of the Government in the Tax Court was that large sums received by DeLucia as extortion money was unreported. DeLucia compromised this tax claim, which settlement was approved by the Tax Court. Agent Ruggaber had no knowledge as to how much, if any, money had been received by DeLucia. His Report

was based upon hearsay. The Agents as experts assumed that this Report had stated proven facts and compiled charts based upon this Report to show available cash on hand at the end of 1947 to be this sum of $48,697.01. When petitioner made a motion for acquittal, because of insufficient evidence, including his claim of no starting point and no unreported source, the prosecutor made claim that he had a firm starting point.

The Court of Appeals held that a starting point and a source had been proved. It is contended that this finding came as a result of a misconception of the evidence. The prosecutor confused the issue in the District Court by claiming that he had the right to prove an alternate method and was therefore not bound to prove starting point or source. The District Court, at the request of the Government, gave instructions based upon this theory. In order to maintain this alternate method, the prosecutor claimed that the evidence for the Government had blocked out all possibility of DeLucia having non-taxable funds on hand for expenditures in 1948, 1949 and 1950. This unfounded claim was contradicted by the evidence for the Government. The prosecutor claimed and the experts assumed, that Agent Ruggaber had proved that in 1938 to 1941, DeLucia had received large sums by extortion. The receipt of this money, of course, would constitute non-taxable funds for 1948, 1949 and 1950. Counsel for petitioners, for the sake of argument, assumed that DeLucia had received about $404,000, the amount shown by the Ruggaber Report. The other evidence in the case showed without dispute, that if DeLucia had so received about $404,000, he had more than enough to cover his expenditures. The Court of Appeals treated the case as one of net worth and said nothing of an alternative. It is contended that this claim of an alterna-

tive method of proof, also reflected in the instructions, improperly relieved the Government of proving a starting point and a likely source. The circumstances proved did not support the claim of any alternative method. This is a net worth case or nothing.

Another method adopted by the prosecutor to relieve him of proving a starting point and a source was to claim that DeLucia had outlined his defense to the Agents during the investigation. With this assumption, the prosecutor claimed that he only needed to prove the explanations made by DeLucia to be false and such proof warranted a conviction. This theory was also reflected in the instructions given at the request of the Government. DeLucia had made no statement or explanation, concerning the source of his expenditures, except that contained in his income tax returns, his parole reports and his books. The statements contained in his returns, his reports and his books did not support the assumption. The prosecutor did not claim that they did. Mr. Bernstein, his tax lawyer, had during the investigation assumed the truth of the Ruggaber Report for the purpose of demonstrating that upon such assumption, DeLucia had enough money from the extortion to cover his expenditures. Mr. Bulger gave testimony before an Agent that he had counted $300,000 kept in the attic. The prosecutor maintained that DeLucia was to be charged with that said by Messrs. Bernstein and Bulger. The District Court believed that the law supported the prosecutor. The Court of Appeals held that petitioner was not to be held responsible for that said by others during the investigation and consequently reversed as to Counts I and II. It is contended here by petitioner that the evidence, the argument of the prosecutor and the instructions show that the jury most likely was misled also as to Count III. The Court of Appeals said that it was

a jury question as to whether petitioner had $48,697.01 or if the defense position was correct, that petitioner had $300,000 at the end of 1947. This finding was based upon a misconception of the issues. Nothing was said by the Court of Appeals about the $48,697.01 figure having been based on hearsay. When the Court of Appeals stated the defense position, that Honorable Court demonstrated that it had been deceived, as had the District Court, by reason of the fact that the prosecutor picked the defense out of that said by others during the investigation. The defense in fact was based upon the plea of not guilty. The prosecutor erected a man of straw and proceeded to demolish it. Because of this maneuver, the Court of Appeals lost sight of the law which places the burden of proof on the Government and does not permit it to shift to the defense, in the absence of proof of a case. The Court of Appeals overlooked, or for some reason failed to apply, the rule that whenever circumstantial evidence is relied upon to prove a fact, the circumstances must be proved and not presumed. The failure might be attributed to acceptance by that Honorable Court of the pretense of the prosecutor as to the nature of the defense. That Honorable Court should have perceived that the defense of DeLucia had been a demurrer to the evidence, under his plea of not guilty. We request Your Honors to decide the questions of law misapprehended below and arising on undisputed evidence.

After the prosecutor proved that petitioner had received a total of $404,000 from extortion during 1935 to 1941 and it was shown that this was hearsay, after an expert had testified to a chart based upon this hearsay (Exhibit 181, p. 341), the prosecutor proved that on six occasions, including testimony before Congressional Committees and the Grand Jury, petitioner had denied the receipt of ex-

tortion money. This evidence was put in, not to prove th petitioner had not received the money but in order th the prosecutor could say in argument as to petitioner (348) that "the soul of the Biblical character resided in h carcass and that truth was a stranger". The Court Appeals missed the point entirely by holding that the Go ernment had always maintained that petitioner had receiv the money. That Honorable Court said nothing of t error of permitting the Government to prove denials mere to show what the prosecutor, without foundation, term as falsehoods. There had been nothing to impeach, t previous denials may have been the truth for all the ev dence shows. The Court of Appeals held that petition at times, by innuendo, admitted the receipt of extorti money. When this is traced back into the record it w be seen that it was based on that said by others. Th method of proof, as to what petitioner said, was held be error by the Court of Appeals. But such holding w lost sight of in the finding by that Honorable Court of innuendo. The Court of Appeals missed the point e tirely, due to a misconception of the evidence.

Upon all of the evidence, we request Your Honors determine ultimate facts to be reached by process of leg reasoning from, or the legal interpretation of the leg significance of the evidentiary facts. It will be learne that considerable confusion was created below by the pros cutor. Also that it is no small job to bring the case ba into focus. Most of the questions presented here could n be understood from any summary statement. In our arg ment, we point to details in order to show that the pros cutor had no case and obtained this conviction by reas of the confusion and prejudice created.

The Court refused to deliver to the defense a report made by a Government witness, stating that it could be of no value. The report was sealed and delivered to the Court of Appeals. That Honorable Court held that the District Court did not err and that petitioner's contention that 18 U.S.C.A. § 3500 is unconstitutional is without merit.

By an instruction given at the request of the Government, the Court took from the jury the question of the materiality of the alleged false statements. The District Court held that the acquittal cured the error, if any. The Court of Appeals held that petitioner's complaint related solely to Counts I and II. Petitioner here seeks to reverse that finding contending that the error may have misled the jury on the law as to Count III.

It was also contended in the Courts below that the guilty verdicts were inconsistent with the not guilty. The Court of Appeals held that there was no inconsistency, particularly as to Count III.

It is contended that the confusion resulted in erroneous instructions given at the request of the Government and the refusal of proper instructions tendered by petitioner. All of these contentions can be better asserted in argument where will be found references to the printed record.

The Court gave a supplemental instruction after the jury had retired. (637) The Court of Appeals held that no error exists. We contend that it was argumentative in favor of the Government.

We hope to demonstrate that the error found by the Court of Appeals to have been committed as to Counts I and II should have required reversal of the conviction on Count III. Also that even if there be a possibility for conviction on Count III, petitioner should have been awarded a new trial, in order that the case might be again tried free of the confusion created.

VI.

Argument.

Obviously, a verdict should not be permitted to stand without support from the evidence. The District Judge in such case, should direct an acquittal. In the cases where the District Judge is, for any reason, unable to see this duty, the Court of Appeals should reverse. One important question submitted involves the exercise of discretion by Your Honors. Your Honors may, under the law, take this case for review or refuse to take it. Your Honors have recognized the duty of supervision over the lower courts. *Mesarrosh* v. *United States,* 352 U.S. 1, 14; *McNabb* v. *United States,* 318 U.S. 217, 225. Just when the duty requires review in a particular case is of course a matter for Your Honors. In the case at bar, Your Honors are called upon to decide if the standards laid down by this Honorable Court in *Holland* v. *United States,* 348 U.S. 121, might be disregarded. Or if the standards have not been understood, should they be explained further? Another question presents itself. Should statutes, whose purpose is to procure payment of tax and to prevent frauds on the revenue, be used to effectuate the purpose of their enactment, or may they be used to harass and punish persons believed to have been guilty of general bad conduct. Particularly in a case where the Government is unable to prove violation of the tax laws, or to gain a conviction without distortion, confusion and appeal to prejudice. In the case at bar, the investigation was carried on for years, yet none of the usual steps were taken to collect any tax claimed to have been due for the indictment years. No 90 day letter was mailed. On previous occasions, the Agents had readjusted income and each time more tax was demanded, payment or settlement was made.

We realize that in the mine run criminal prosecutions, Your Honors generally leave questions of fact to the lower courts, particularly where conflicts and credibility are involved. In the case at bar, we do not request the weighing of evidence, unless the examination of the record, to see if there be any evidence on vital points, may be termed "weighing the evidence." We do not submit matters of conflicts or credibility.

There is a story somewhere of an Inn Keeper who cut the traveler down to fit the bed or stretched him out, if he was too short for the bed. Your Honors will find, we believe, that the prosecutor stretched his case to cause it to appear like *Holland* v. *United States*, 348 U.S. 121 on the facts. The reason for this distorting of the facts is that Your Honors had in the *Holland* case held that the circumstances proved were sufficient to support the guilty verdict. Holland, previous to trial, had given an explanation to the Revenue Agents concerning his defense, when confronted with the fact that his expenditures exceeded his assets and reported income. He claimed that the expenditures came from a certain cash hoard and explained where he had obtained the cash. The Government was able to prove this explanation to be false by circumstantial evidence. Holland admitted to the agents that he had taken money from the cash register for living expenses. The tapes had been destroyed. The restaurant business was proven to be a source of unreported income. Your Honors will find many differences between the *Holland* case and the case at bar, including

(a) DeLucia made no statement during the investigation to the Revenue Agents to explain his expenditures. The only explanations made were contained in returns, books and parole reports, not shown to have been inaccurate.

(b) DeLucia made no claim to the Revenue Agents that his expenditures came from a cash hoard.*

(c) The only source of income likely to have been received by DeLucia was shown on his books and in his parole reports. The prosecution was unable to show any other likely source during 1948, 1949 and and 1950. No source at all is shown for possible unreported income.

Knowing that DeLucia had made no explanation during the investigation, the prosecutor succeeded in casting the burden of proof on petitioner by maintaining that explanations by others during the investigation were the same as an explanation by DeLucia. The prosecutor claimed that, as he had proved this defense made by others to be false, the Government was entitled to a verdict, without proof required in a net worth case. The prosecutor confused the District Court with this claim and prevailed upon the trial Court to adopt such theory of law. This resulted in error as to the instructions. The Court of Appeals perceived that the prosecutor had produced no evidence to show that DeLucia could be charged with that said by others, but that Honorable Court failed to perceive that the error affected the entire case. When the Agents indicated that a criminal case was in prospect, Mr. Bernstein, DeLucia's tax attorney, called upon the Agents and endeavored to convince them that a criminal charge could not be sustained. Mr. Bernstein made explanations to the Revenue Service. The tax lawyer assumed, for the purpose of argument with the officials, that petitioner had received large sums of money by extortion. Mr. Bernstein

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* The Government proved that he told the Kefauver Committee that he had $300,000 when he came out of the penitentiary. He never told them, or any one else, the source of that money.

was familiar with the foundation for the claim made in 1945 for additional taxes as shown by a 90 day letter, as Mr. Bernstein had represented the tax payers in the matter of the settlement of that claim. Mr. Bernstein also reminded the Agents that DeLucia had testified before the Kefauver Committee that when petitioner came out of the penitentiary he had $300,000. Mr. Bernstein, during the investigation, presented summaries to show that if De Lucia had in fact received the amount of extortion money as claimed in the 90 day letter, some $404,000 and had expended the amount shown by the parole reports there could be no proof of deficiency for 1948, 1949 and 1950. Also that if DeLucia had $300,000 when he came out of the penitentiary in 1947 that sum added to his reported income would be enough to cover for expenditures in 1948, 1949 and 1950.

The District Judge permitted the prosecutor to use the evidence of the statements so made by Mr. Bernstein, during the investigation, as if they had been made by DeLucia. But the prosecutor first changed the amount of $404,000 originally determined by Agent Ruggaber on hearsay to be the share of extortion money paid to DeLucia to about $227,000. Then the prosecutor added to the statement by pretending that DeLucia had asserted that the $300,000 had been part of the proceeds of extortion. This pretense deceived the District Judge to the extent that His Honor believed it to have been based upon facts proved. The courts below have been unable to see that the prosecutor twisted that which had been said by Mr. Bernstein. The prosecutor also treated the evidence of that testified to by Mr. Bulger in the investigation about the $300,000 as if DeLucia had said it. The District Judge was unable to see that it was error to permit the prosecutor to connect DeLucia with that said by others. The erroneous view of the District Judge caused the Court to

give prejudicial instructions at the request of the Government and to refuse proper ones tendered. The Court of Appeals saw the error of permitting the prosecutor to charge DeLucia with that said by others and reversed the judgment as to Counts I and II. That Honorable Court was unable to see that the same error brought about the conviction as to Count III. The prosecutor claimed that the Government was able to prove that DeLucia had not obtained sufficient extortion money to enable him to have left $300,000 when he came out. The figures used were not only based upon hearsay but they were arbitrarily juggled. DeLucia is shown to have denied the receipt of any extortion money and he never said that the $300,000 came from extortion. It is easy to understand that a jury will in some cases convict on general principles, but another question is presented when judges neglect to apply fundamental principles and consequently approve of verdicts so obtained. In order to understand our case, one must know the record. One must not charge DeLucia with that said by others, in the absence of proof that such evidence was admissible as against petitioner. One must know DeLucia merely stood on his plea of not guilty and that his defense was not that pretended by the prosecutor. Nearly three years before DeLucia was indicted and while the case was being considered by the Agents, we took the position, as shown by the transcript of our meeting with the Agents on September 1, 1954 (406), that the Government would be unable to prove its case. For about three years more the search for evidence was continued. When the statute of limitations was about to run on 1950, this indictment was returned. It now has been demonstrated that the Government did not have sufficient evidence upon which to sustain a verdict. We stipulated most of the evidence. The prosecutor preferred to put on witnesses familiar with records of certain undisputed expenditures. Petitioner offered to stipulate more, but the further offer was declined.

We feared confusion. The Courts below were unable to perceive that when the experts assumed a figure of $48,697.01 as "possible cash on hand, December 31, 1947," there was no evidence in the case to support the assumption made. The experts pretended to have such evidence. In order for Your Honors to perceive the worthlessness of the opinions of the experts, it will be necessary for us to explain the circumstances upon which they based a starting point. No doubt the jury was impressed by the official appearing nature of the reports of the Agents and charts made from them. The prosecutor referred to the reports as documents. It is too much to expect of a jury to enforce the rule against the use of hearsay. When a trial Judge refuses protection and the Court of Appeals fails to fully appreciate the point, a lawyer is put on guard and prompted to over explain, rather than risk a short statement which might do for a different sort of case. We realize that when we charge the prosecutor with misconduct, we must demonstrate the truth of our charges from the record. In a circumstantial evidence case this requires close attention to details.

Our last hope is that Your Honors will perceive that the Government erected its house on sand. That Your Honors will decide to take this case. Your Honors said in *Holland v. United States*, 348 U.S. 121, that

> "Appellate courts should review the cases, bearing constantly in mind that the difficulties that arise when circumstantial evidence as to guilt is the chief weapon of a method that is itself only an approximation."

The case at bar presents further difficulties, brought about by proof of a felony conviction, parole, alleged extortion and gambling income, to mention only a few incidents of the trial likely to arouse prejudice. The prosecutor added fuel to the flames by cluttering the record with immaterial

evidence and putting petitioner on trial for charges, made in argument, having no support in the evidence or in the indictment. In order to review this case, where the Government claims that the circumstantial evidence is sufficient and petitioner asserts a total failure of proof on vital elements, it will be necessary to understand just what was actually proved, as distinguished from that claimed by the prosecutor to have been proved. We quote from *Raymond Pearson Motor Co.* v. *Commissioner of Internal Revenue*, 246 F. 2d 509, 513:

> "Whether the issue be a question of law or of ultimate fact reached by processes of legal reasoning from, or the interpretation of the legal significance of, the evidentiary facts, which are here undisputed, that issue can be considered and decided on appeal free from the restraint of the so called 'clearly erroneous' doctrine." (citing cases.)

Although it may be too much to expect of a jury we have a right to expect a court of review to be able to decide questions of law properly as applied to our particular case. Also to determine ultimate facts, distinguish hearsay and interpret the legal significance of facts, without confusion created by the nature of the case and the manner in which it was presented and argued by the prosecutor. Your Honors said in *C.M.&St. P. Ry.* v. *Coogan*, 271 U.S. 472, 477:

> "Whenever circumstantial evidence is relied upon to prove a fact, the circumstances must be proved and not themselves presumed. *United States* v. *Ross*, 92 U.S. 281; *Manning* v. *Insurance Co.*, 100 U.S. 693, 698 (478). The record leaves the matter in the realm of speculation and conjecture. That is not enough."

In the case at bar the Court of Appeals was able to perceive that the conviction as to Counts I and II rested on speculation and conjecture, but that Honorable Court was

unable to see that the very foundation of Count III was also lai' upon guess work. In order to demonstrate the basis for our contentions here it becomes necessary to make a somewhat detailed statement of the case, with a little argument thrown in as we proceed.

If this case be properly stated and fully understood, very little argument will be necessary.

This is a criminal prosecution, an income tax case, commenced by an indictment (2) filed March 4, 1957.

The Government filed a printed Appellee's Appendix based in part on portions of the record not printed by petitioner. References to this Government Appendix has been made as follows (G. 12). As we find matter that has been printed in both Appendices, we refer only to that furnished by petitioner, thus (12).

Petitioner and one of his lawyers, Joseph Bulger, were charged with conspiracy in Count IV. The jury acquitted. Both defendants were discharged as to Count IV. (642) Count IV was the only count charging Mr. Bulger, so he is out of the case as a defendant. The jury rendered separate verdicts of guilty upon each of the first three counts (642). Sentences were to run consecutively, three years and a fine as to each count.

The Court of Appeals reversed as to two counts, so there remains but one conviction on Count III. Count III charges violation of 145 (b) as to 1950. The returns for 1948, 1949 and 1950, together with attached schedules, were introduced by stipulation and are printed in this record (90 to 106).

The Court of Appeals said, (herein p. 169):

> "DeLucia's main thrust is delivered at the Government's evidence sustaining the net worth method of proof."

It is here contended that that Honorable Court erroneously found, as to Count III, the evidence to be sufficient, with a starting point, with a likely source of unreported income. It was contended by petitioner in both lower courts that the only starting point evidence was based upon unwarranted assumptions, hearsay and conjecture. The only source of income had by petitioner during the indictment years was from his farm and small investments. This income was carefully reported. The accounts were supervised and approved by Parole Officials. In the District Court the necessity of proving a starting point and source was thrown into confusion by reason of the fact that the prosecutor maintained that the Government under the law was not required to prove these elements, claiming an alternative method. The prosecutor in fact had no foundation for any alternative. Instructions were erroneously given at the request of the Government based upon this unfounded theory.

When the indictment is considered, it will be observed that the charges fall into three classifications, *i.e.*,

(1) Count I and II, the making of false statements;

(2) Count III, net worth;

(3) Count IV, conspiracy to make false statements.

In the evidence, argument and instructions, these charges were interwoven. The Government asked for conviction on all four counts. The defense requested acquittal on all. The District Court refused to require an election and de-

nied motions made for severence. The denial of these motions is here mentioned merely as a part of the history of the proceedings. Counts I and II involved taxes for 1948 and 1949. The statute of limitations had run. The Government sought to avoid the statute of limitations by alleging false statements in 1954, within the six years. The proof failed as to 1948 and 1949. The District Court refused to grant our motion for acquittal, based upon our contention that there had been a total failure to prove a necessary element. The Court of Appeals perceived that petitioner had made none of the false statements charged. That Honorable Court found that statements alleged to have been false were not connected up with DeLucia. We quote from the opinion of the Court of Appeals, (herein p. 167):

> "We, therefore, hold that there was a total failure to prove a necessary element of the offense charged in both Count I and II; that the evidence is clearly insufficient to support the verdict of guilty as to those two counts and the District Court erred in denying DeLucia's motion for judgment of acquittal on counts I and II * * * The portion of the judgment based upon Counts I and II is reversed and cause remanded with instructions grant the Defendant for judgment of acquittal thereon."

Obviously, petitioner has no objection to this finding as to Counts I and II. The Government did not petition for rehearing. Counts I and II include an allegation of false statements. There is nothing alleged about false statements in Count III. Consequently, the Court of Appeals overlooked the fact that the prosecutor dragged false statements into Count III, by claiming that petitioner's defense to all of the counts was based upon false statements. De Lucia made no statement, true or false, but the prosecutor

charged him with statements made by others. In his argument to the jury the prosecutor spoke of things said during the investigation by Mr. Bernstein and Mr. Bulger as if they had been said by DeLucia. The instructions given at the request of the Government supported the position taken by the prosecutor in this regard. The Court refused instructions designed to help keep the jury from making use of such evidence as against DeLucia. The Court of Appeals perceived that the use of such evidence against petitioner required reversal as to Counts I and II, but failed to see that the same error assisted the prosecution as to Count III.

The portion of the judgment based upon Count III was affirmed. (herein p. 173) In our petition for rehearing we asserted that even if that Honorable Court adhered to its finding as to Count III, the case should be remanded for a new trial on that Count, unencumbered by the mass of evidence introduced under the other three counts, having no legitimate bearing on guilt or innocence as to Count III. A like request is made of Your Honors.

Although Count I, II and IV are now out of the case, it will be necessary for us to describe them and consider much of the evidence introduced under them, in order that some of the questions submitted here be understood. The prosecutor presented the case for the Government as one package, with but one key to it all. (547) The various counts of the indictment may be summarized as follows:

COUNT I.

Petitioner is said to owe income taxes for 1948. In order to conceal this debt, DeLucia is said to have made and caused to have made, false statements about the existence of a $300,000 cash hoard. The time and place of the

making of the false statements are set out in the indictment (2 to 7) limited by the Amended Bill of Particulars. (25)

COUNT II.

Petitioner is said to owe income taxes for 1949. The charge is identical with Count I, except for the tax year named, including specification of the same alleged false statements.

COUNT III.

Petitioner is charged with the filing of a false return for the year 1950, in violation of § 145 (b) Internal Revenue Code of 1939.

COUNT IV.

Count IV charges a continuous conspiracy to make false statements concerning a matter within the jurisdiction of the Revenue Service, in violation of Title 18, § 1001 U.S.C. The overt acts alleged in Count IV, as limited by the Amended Bill of Particulars (25), are alleged to be the same false statements said in Counts I and II, to have been made, or caused to have been made, by petitioner and Mr. Bulger.

It was urged on the motion for new trial that the acquittal on Count IV established the failure to prove elements which the Government was required to prove in order to establish guilt as to Counts I, II, and III. The District Court ruled that there had been no inconsistency between the not guilty on Count IV and the guilty verdicts on Counts I, II and III. The Court of Appeals also said there had been no inconsistency and added, (herein p. 172):

> "As we are now concerned only with Count III what has been said is completely dispositive of any vestige of inconsistency."

In an effort to establish a starting point, the prosecutor went back to 1920 when petitioner entered this country (27). The Court of Appeals said (herein p. 169):

> "The Government undertook to prove what assets defendant had on hand at the beginning of 1948 by means of showing his entire preceding financial history."

It is our contention that the prosecutor failed in this undertaking for lack of evidence. In order to make this point, misconceived by the lower courts, it will be necessary for us to discuss in detail some of the circumstances in evidence. DeLucia at no time made a financial statement, so if "his entire preceding financial history" was proven at all it was by circumstantial evidence, upon which experts built tables and charts.

The evidence shows a conference between lawyers and Revenue Agents held September 1, 1954. In discussing the fact that DeLucia had told the Kefauver Committee that he had $300,000 when he came out of the penitentiary in 1947 there appears the following (425):

> Mr. Bernstein: You have the case that was just decided out in Los Angeles,—where the court said it was impossible to say that the Taxpayer didn't have a certain sum,—when the proof showed that he did have it.
>
> Mr. Smith: The proof isn't that he had it. He came in, in 1939, to this Department and testified that he had on hand, at the end of 1939, some measly amount of cash. I don't know what the exact figure was. Take that particular amount of cash and add to that his receipts from that point forward, and that amount of cash was after this alleged extortion—
>
> Mr. Bernstein: (Interposing) you say he came into this Department and testified to that?
>
> And you say you have a copy of this testimony here? Is that true?

Mr. Smith: "He testified before—he was examined by Revenue Agents and he presented books and records during that examination showing his receipts and disbursements and his cash on hand at the beginning of the period and the cash on hand at the end of it. • • • (429) We have gone pretty far in disclosing to you the nature of the charges. The man comes in on a certain date with books and records that indicate he had a certain amount of money on hand. From that point forward, computation, taking into consideration and crediting all loans, all sources of income, with the exception of this alleged $300,000 that he testified to, would indicate that he was short. • • • (430) The books and records I have reference to are the books and records Mr. DeLucia presented back in the 30's, the late 30's, when he was examined by a Revenue Agent, which indicated that at the end of a certain year, he had a certain amount of cash on hand, and from that point forward, it is a mathematical calculation. Taking into consideration his testimony of this $300,000, and I say, bearing in mind the additional assessment which may or may not have been considered in his figure of cash on hand at a certain date, that the man is short in the years '48 and '49 and 1950. It is strictly mathematics, Gene. There is no mystery. I am not trying to attempt to put any mystery in this case. It is strictly a case of mathematics."

The books and records referred to by Agent Smith in the above conference were described in the case at bar by Agent Klein. Agent Smith was shown to have been mistaken as to the contents of the Report made by Agent Klein. We call attention to that said by Agent Smith to show the theory of the Government. When the evidence was produced in the case at bar it appeared that the prosecutor intended to use Agent Klein to establish a starting point but the evidence failed in this respect. Agent Klein testified (168)

to a three hour interview with DeLucia in 1940. The books and records were described. We quote (170):

Mr. Barnett: Q. Did you ask any questions in this conversation with Mr. DeLucia about the entries in the books?

Agent Klein: A. Why yes, I originally asked him how he computed his income, and he explained it with the entries in that book. I asked him if those were all the moneys withdrawn during the year, and he said "Yes."

Q. He had withdrawn from what?

A. Withdrawn from, oh, the vault or his cash reserve, and he explained his method of bookkeeping was to put the money that he received into the vault, and whenever he took anything out he put a slip of paper in, what he took out, or a bill that he paid, and then those items would be entered into this book.

Q. They would be entered into the book as what?

A. As disbursements or expenditures.

Agent Klein described the method of bookkeeping and how he checked with the returns for 1938 and 1939. An adjustment was made of some small changes. Agent Klein's Report was put in evidence (Exhibit 62, p. 175) including schedules upon which appear "Cash in Vault," "Cash in Pocket" and "Cash in Bank." After Agent Klein was cross examined (185) and had left the stand he was recalled (242):

Mr. Stewart: Q. Referring to the conversation you had with Mr. DeLucia, which you testified to yesterday, and that took about three hours in your office, during that time did you ask Mr. DeLucia if the cash you were talking about as being on hand at any particular period, opening and closing was all the cash that Mr. DeLucia possessed or had?

Agent Klein: I did not.

Q. You weren't concerned in that?

A. No, it didn't affect me.

Q. Your memory of the books, as you remember them now, did they reflect or say that that was the total cash that Mr. DeLucia possessed?

A. Well, the books just reflected the cash in three categories.

Q. And they didn't say it was all the cash, did they?

A. No, there was no notation. Just the categories and the amounts."

At this point Your Honors might examine the Report and schedules. (175) Nowhere will be found any indication by Agent Klein that DeLucia had said the cash was all of his cash. Nor did Agent Klein in his Report indicate that the books showed that that was all of his cash. Nothing is said in Exhibit 62, (175) or in the testimony of Agent Klein one way or another about other assets. So the testimony and Report of Agent Klein was shown to have no value as a starting point. However, as we expect to show, Agent Mahon (323) testifying as an expert construed the testimony and the Report of Agent Klein to suit himself. The expert put something in it that is not there, i.e., that it shows all of the cash possessed by DeLucia. Later the prosecutor shifted the burden of proof to petitioner, and claimed that a starting point was not necessary. As we have said, all efforts to establish a starting point were placed in confusion by the claim that the Government, under the law, had an alternative. At the same time, the prosecutor argued that the Government had proved a firm starting point. This "firm starting point" was based upon a table prepared by Agent Mahon (Exhibit 181, p. 341) showing "Possible Cash on Hand December 31, 1947" as $48,697.01. So it becomes necessary for us to examine the testimony of this expert to see how he arrived at that figure. The Courts below failed to appreciate that the opinion of Agent Mahon, as illustrated by Exhibit 181, (341) had no value. The Court of Appeals said that the

contention of the Government that $48,697.01 was a starting point, created a question of fact for the jury. That Honorable Court overlooked the fact that there was no evidence to support the opinion of the expert as to the $48,697.01.

Another report used as foundation for expert testimony including tables and charts, was made by Agent Ruggaber (Exhibit 55, p. 245). This was based on hearsay and has no value. The Report must be described in order to understand the manner in which Exhibit 181 (341) was composed. Government's Exhibit 181 (341) is a chart prepared by Agent Mahon to show computation of possible cash on hand, 1934 to 1947 inclusive. Agent Ruggaber (114) prepared his report from the printed transcript of a case in New York where DeLucia had been convicted.*

The New York prosecution was based upon the charge that the defendants conspired to extort about $1,800,000 from the executives in the moving picture industry. The charge being conspiracy, it was not necessary for the Government to prove the receipt of money by the defendants. The jury in the case was so instructed.**

After the New York conviction, after the appeal and petition for certiorari were lost, while petitioner was in the penitentiary in 1944, the Revenue Agent examined the printed transcript of the evidence given for the Govern

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* Your Honors take judicial notice of the record, printed copy on file in this Honorable Court, **United States v. Campagna, et. al.** (including DeLucia) 146 F. 2d 524, Certiorari Denied, 324 U.S. 867.

** In the case at bar, the Government did not express any claim that the judgment of conviction in the conspiracy case established the receipt of money by DeLucia.

ment in the New York case. (130) The Agents concluded therefrom that the defendants had divided among themselves about $1,800,000 obtained by extortion, over a period of years. (127) This was hearsay. There was no testimony given by petitioner in the New York case, (130); no admissions said to have been made by DeLucia were proved, either in the New York case (136) or in the case at bar. Even considering the hearsay, no one said he gave DeLucia a cent. (131, 132) Cross-examination of Agent Ruggaber (263) made clear that this report had no value as evidence. In view of the fact that expert testimony was based upon that assumed by Agent Mahon to have been proven by the Ruggaber Report, it becomes necessary for us to describe the manner in which the Report was made up.

We quote from the Ruggaber Report (247):

"The testimony in the earlier trial of George E. Browne and Willie Bioff, together with the testimony of the second trial in which this taxpayer was also convicted, was briefed, and the income taxable to the several persons was established from the information and evidence disclosed at those two trials. The case of George E. Browne was completed in October of 1944 and the exhibits used in this case and the *Browne* case are identical.

"There were two principal sources of income via the conduit of Browne and Bioff and they were, first payments made by the producers and the exhibitors of moving pictures to Browne and Bioff as labor leaders to keep them from demanding the restoration of payouts previously taken by the moving picture operators in the various movie houses throughout the country, which Browne as International President controlled. Second, the 2% assessment fund raised from the salaries of the self same operators, which was to be used for union organization purposes but actually

was expended by the union officials and the hoodlums that they represented, this taxpayer being one of the so called Nitto mob whose members were indicted and convicted of extortion."

Petitioner was unable to prevail upon the Courts below to regard this Report as hearsay.

We were unable to cause the District Court to hold that an opinion based upon the assumption that the Report had proved facts was of no value as evidence.

If the Judges of the Court of Appeals did observe that this was hearsay, we find nothing in the opinion to that effect. If that Honorable Court deemed this as hearsay, the Judges must have misconceived our point and failed to have seen that such finding should have ended the case. The prosecutor confused the issue by claiming that the Government did not need a starting point or a likely source of income, under the alternative method of proof. Agent Mahon in composing Exhibit 181 (341) assumed that at the end of 1934, DeLucia had no cash available for expenditures. For some of the following years this expert included in his chart, under the heading "Gross funds available" various amounts, after assuming the figures to be found in the Ruggaber Report to have been based upon fact. Another expert, Saldana (525) compiled a chart (Exhibit 223, p. 528) for years 1948-1949 and 1950, subsequent to the chart prepared by Agent Mahon. This last chart assumed the correctness of the figures computed by Agent Mahon on his chart. (Exhibit 181, p. 341)

If Your Honors decide to examine into the question as to whether there be any evidence at all to support the verdict, it becomes necessary to observe the manner in which Agent Ruggaber arrived at his figures. The method adopted by him in 1945 was intended and used as a base for a 30

day letter. The Report should not be acceptable as a base for a criminal charge. Agent Ruggaber based his report on hearsay. Then he made an adjustment in favor of the taxpayer, insofar as a civil suit would be concerned. This adjustment was worked to the detriment of DeLucia in the case at bar. So it becomes necessary to point out the arbitrary manner in which this adjustment was made.

In explanation of his report, Agent Ruggaber testified that the accomplice witnesses Bioff and Browne told the court and jury in the New York case that they (Bioff and Browne) had collected large sums of money. That, after retaining a share, they had turned the balance over to persons (said by Bioff and Browne) to be associated with petitioner. (133) These third persons acted as conduits, to adopt the phrase used. We quote from the cross examination of Agent Ruggaber (262):

> Mr. Stewart: Q. I notice in reading through the schedules that there is reference to a man named Nick Circella. Can you explain what his participation in this was?
>
> Agent Ruggaber: A. Nick Cirella in this particular venture appeared to be the messenger boy. He would pick up the six-ninths which was distributed between Nitto, Mr. DeLucia and Campagna from Isadore Zevins, at times, in the distribution of the two percent fund; or in the funds that were picked up from the producers and exhibitors by either Bioff or Browne.

Nick Circeila did not testify anywhere, nor did he make any statement.

Consequently, Agent Ruggaber gained this information about distribution, second hand, possibly from one also relying on hearsay. Agent Ruggaber testified that he had never talked to the petitioner about this case. (272)

Agent Ruggaber was able to find in the printed record of the New York trial corroboration of Bioff and Browne as to the fact that Bioff and Browne had received the the money from the union and from the moving-picture executives. (132) The corporation and union records demonstrated that money had been drawn. Bioff and Browne admitted having received the money. But as to where the money went from there, after it left the hands of Bioff and Browne and how it was to be divided, Agent Ruggaber had only this hearsay evidence. Although, as he admitted on cross-examination, he had no first hand evidence of the transactions and none at all as to the actual share received by petitioner, he testified that he had assumed that petitioner had received a portion of this extortion money. On the witness stand in the New York case, Bioff and Browne told what the agreement had been, as to the share to be retained by them. They testified that they had deducted their share and had sent the balance from time to time by hand of a messenger, to the group of defendants.

Without the slightest knowledge of the fact Agent Ruggaber assumed that the share so sent via a conduit, had been divided equally. This calculation gave to each of De Lucia, Campagna and Nitto 2/9ths of the total sum so sent. All of this was obviously hearsay. Bioff and Browne did not claim to have been present when, if at all, the money was divided. All they knew, or anybody knew, was that the money was delivered by them to a go-between later to be divided. This Report was used in 1945 by the Agents as foundation for a 90 day letter mailed to De Lucia, while petitioner was in prison. The 90 day letter was based, as is also shown by the Report, upon an allotment to DeLucia of 2/9ths or about one million eight hundred thousand dollars, the total sum said to have been ex-

torted. In the Report the total share of petitioner was said to have been about $404,000. Agent Ruggaber testified (141) that he had formed an opinion from what he had read that the share of DeLucia was about $404,000. (141) In the case at bar, it was undisputed that for the indictment years, DeLucia spent more money than he would have available, if he had no more than the income upon which he paid taxes, during those years.

Even if the hearsay be accepted as evidence, the record, including the testimony of Agent Ruggaber (245) shows that in the present trial, if the Government had used the Report to establish the petitioner had received as his share of the extortion the sum of about $404,000, the case would have collapsed right there. The possession of $404,000 in addition to the income reported by DeLucia for the years covered by the Report would have been more than sufficient to cover all of the expenditures shown to have been made by petitioner in subsequent years. The experts in the case at bar assumed as a fact that DeLucia had obtained about $227,000. Agent Ruggaber explained the manner in which he had calculated the $227,000 figure.

For the purpose of making a claim on petitioner for taxes, while petitioner was in the penitentiary, Agent Ruggaber combed over the evidence given in the New York trial and ascertained the various amounts paid by the moving picture people.

We quote from the Ruggaber Report (246):

> "At no time during the examination was this taxpayer contacted for the reason that prior to his conviction in December 1943 in the Federal District Court in New York City, for extortion, this department did not desire to interfere with the investigation by other Federal departments. While under indictment it was

not advisable to contact the taxpayer while he was available in Chicago for the reason that he could legitimately refuse to answer questions pertaining to his income for fear of incrimination. Consequently no action was taken until after the trial and conviction and until the trial testimony was available."

From the records of the movie companies, Agent Ruggaber was able to ascertain the amount and approximate date of each payment made by the executives to Bioff and Browne. From this data, Agent Ruggaber was able to not only total the amounts obtained by Bioff and Browne but the Agent was able to divide that total and ascertain the amount obtained by Bioff and Browne in each of the years from 1935 to 1943 inclusive. Agent Ruggaber assumed that these yearly amounts were passed on by Bioff and Browne during the year obtained to an agent of the group and eventually divided evenly among members of the group.

Concerning the share assumed to have been obtained by DeLucia, the Report (Exhibit A to F) shows the following:

Year	Total Amount	Extortion Income
1935	$ 206,406.79	$ 44,704.04
1936	377,548.00	83,899.53
1937	500,010.00	124,446.61
1938	332,225.00	73,827.75
1939	189,233.59	42,051.91
1940	161,599.52	35,910.98
Total	$1,760,022.90	$404,840.82

Before Agent Ruggaber had touched the returns made by DeLucia for the years covered by his Report, the returns showed the following:

Year	Net Income per return	Other and miscellaneous income per return
1935	$ 13,260.00	$ 44,757.06
1936	24,000.00	83,899.61
1937	42,916.63	39,400.00
1938	59,747.00	56,950.00
1939	70,609.31	73,058.17
1940	60,764.78	60,139.70
1941	72,186.80	70,738.98
1942	71,026.60	72,503.52
1943	79,700.00	80,375.00

Then, as Agent Ruggaber explained, he examined the income tax returns made by DeLucia for the years in question. Agent Ruggaber found a notation in the file that DeLucia had been examined in 1936 by an office Auditor and that petitioner had explained to the Auditor that the income disclosed as "Miscellaneous" resulted from winnings on a prize fight. (248) Agent Ruggaber also took into consideration the Report of Agent Klein, (166) who in 1940 had examined the returns from 1938 and 1939. (248) In his examination of the returns for 1935 to 1941 inclusive, Agent Ruggaber found numerous items as shown above, or reported income on which DeLucia had paid tax designated on the return by petitioner as "Miscellaneous." Agent Ruggaber assumed the following as facts:

(a) The total share received by DeLucia was about $404,000.

(b) In view of the fact that the returns filed by DeLucia did not identify certain income other than "Miscellaneous," this income so reported must have been derived from the extortion. That DeLucia had no other "Miscellaneous" income.

In other words, the Agent assumed that after DeLucia received extortion money for a given year, at the end of the year petitioner had put part or all of it, into his income tax return and had in that manner paid taxes on some of the extortion money. On cross-examination Agent Ruggaber admitted that none of this income designated on the returns was identified as to source. We quote (142):

> Mr. Stewart: Q. As you picked up his returns in those previous years and you found he said "Miscellaneous, $75,000." for instance, you could not tell from the return what that income was, could you?
> Mr. Ruggaber: I could not."

By assuming as a fact that DeLucia paid taxes on extortion money under the designation "Miscellaneous", Agent Ruggaber calculated the difference between the extortion income for each year and the reported "Miscellaneous."

In the years where more "Miscellaneous" was reported than extortion funds received, Agent Ruggaber did not claim any additional tax. In years where the extortion money exceeded the "Miscellaneous," Agent Ruggaber subtracted the "Miscellaneous" from the extortion income for that year and claimed taxes on the difference, as unreported extortion income. (143) We quote again from the Ruggaber Report (248):

> "The taxpayer has reported 'Miscellaneous Income' for the years beginning with 1937 and in computing

the income from the moving picture companies, credit was given for such miscellaneous income previously reported."

It will be seen from the Ruggaber Report that after this adjustment, the unreported extortion income, assumed to have been received by DeLucia, was calculated as follows:

Year	Adjustment per 90 day letter
1935	$ 44,757.06
1936	83,899.61
1937	85,046.71
1938	14,078.08
	$227,781.46

This adjusted Report was used by Agents Mahon (323) and Saldana (525) as if it contained a statement of fact as to the figure $227,781.46. If these experts had used $1,800,000 or $404,000 instead, they could just as well have thrown away their charts. These Agents assumed that the cash available to DeLucia from the extortion money was the above $227,781.46 shown by the Ruggaber Report, after Agent Ruggaber had made these adjustments. As is shown, according to the Ruggaber Report, the total share assumed to have been received by DeLucia, from the extortion money, was about $404,000. In the case at bar, as we have said, if DeLucia had been credited with having $404,000 to spend, in addition to the "Miscellaneous" income upon which he paid taxes, the tables and charts prepared by the Agents would have been inaccurate as to funds available at the beginning of each indictment year. The expenditures shown in 1948, 1949 and 1950, in excess of income for those years, then could have come from cash available at that time. Not from current income.

In such event the Government had no case on its own theory of net worth proof. We trust that Your Honors will permit us to make this argument without making the conclusion that we are admitting the receipt of extortion money. The record shows that Mr. Bernstein, during the investigation assumed for the purpose of argument that DeLucia had received about $404,000 in this manner. The prosecutor jumped on that and treated that said by Mr. Burnstein as if DeLucia had admitted the receipt of the extortion money. Later we expect to explain the manner in which the prosecutor built his case on this sort of a jump.

DeLucia, in his monthly reports to his Parole Agent informed those officials that money expended by him came in part from funds on hand. The record shows that petitioner has always denied the receipt of any extortion money. On cross-examination, Agent Ruggaber readily admitted that he had no first hand information concerning the amount of money actually received by the group, or the amount received by petitioner. The Agent admitted that he obtained his information from the printed transcript of the evidence introduced in the New York trial. In addition he had read some statements. We expect to explain, with references to the record, the manner in which the experts and the prosecutor made use of the Ruggaber Report. We quote from the cross-examination of Agent Ruggaber (130), referring to the printed transcript of the evidence in the New York trial where Bioff and Browne had testified:

> Mr. Stewart: So far as your transcript is concerned, insofar as these statements are concerned, Paul DeLucia could have gotten one hundred per cent of the money, so far as you are concerned, is that right?
>
> Agent Ruggaber: He could have.

Mr. Stewart: Q. Or, he could have gotten none of it?

Agent Ruggaber: A. I wouldn't know.

Mr. Stewart: Q. You wouldn't know?

Agent Ruggaber: A. No. • • •

Mr. Stewart: (142) Q. But as far as you know, when that fact becomes of some importance in a different type of case, like a criminal case, as far as you know as a fact, you don't know whether that $400,000 was the "Miscellaneous" income, or not, do you?

Agent Ruggaber: A. All I—

Q. You can't tell from the returns, can you?

A. None of it was identified as to source.

Q. And it was unidentified as far as you were concerned?

A. That is right.

Q. So when he was paying in previous years and he called it "miscellaneous," he was paying on a sum of money you had no notion about where it came from, isn't that right? • • • As you picked up his returns in those previous years and you found he said "Miscellaneous, $75,000," for instance, you could not tell from the return what that income was, could you?

A. I could not • • •

Mr. Stewart: Q. (143) But as far as you know, and I believe you have already answered this, he could have gotten the $400,000 and not paid anything on that as far as you knew, isn't that right?

A. As far as I know he could have, yes."

Agent Mahon sat in court and heard this cross-examination. The prosecutor had available the Official Reporters' daily transcript. Both of them, the expert and the prosecutor, took care of this bit of cross-examination by just denying that it took place.

In the cross-examination of Agent Mahon who testified as an expert and introduced his chart (Exhibit 181, p. 341) showing possible cash on hand at the end of 1947 as $48,697.01, there appears the following (362):

Mr. Stewart: Well, now, as you are giving testimony here, as I understood Mr. Barnett's questions and as I believe you probably understood them, you were basing your answers on the evidence that has been introduced in this case, isn't that right?

A. That is right, sir. • • •

Q. And all the time you have been making the answers, we can qualify each answer that you have made, that it was based upon evidence which the Court and the jury heard in this case, as well as your hearing it, is that right?

A. That is right, sir. • • •

Mr. Stewart: (371) Q. Were you here when I asked Mr. Ruggaber and he said you couldn't follow the money, after you found it was in the hands of Mr. Bioff and he said he turned it over to those other fellows, you couldn't follow how that was divided up, how much Paul actually got, could you? As far as you know, Paul got the $1,800,000. Were you here when I asked the question, and Mr. Ruggaber told me yes?

Agent Mahon: A. I remember some general line of questioning like that, sir. I wouldn't say I remember the exact question, though.

Q. All right. But if it is a fact that Paul DeLucia got $1,800,000—

Mr. Barnett: Your Honor, that isn't the fact.

Mr. Stewart: Q. (Continuing)—then we are wasting our time here, aren't we?

Agent Mahon: A. That is conjecture.

Mr. Barnett: There was no such testimony whatsoever, your Honor.

Mr. Stewart: I will leave it to the jury whether there was any such testimony.

Mr. Barnett: There wasn't.

Mr. Stewart: Q. It is true, isn't it, that judging the testimony, someone who had heard it, like the jury, if they come to the conclusion that Mr. DeLucia got $1,800,000 at that time, why, we are wasting our time with a lot of these figures, aren't we?

Agent Mahon: A. There was no such testimony to that effect, Mr. Stewart.

Q. That is your statement.

A. That is my statement, right. (372).

The above will illustrate the manner in which the prosecutor refused to accept that said by his own witnesses and how the expert made up his charts in disregard of the evidence. The record discloses even more of this sort of conduct.

The 90 day letter based on the Ruggaber Report was mailed to DeLucia while petitioner was in the penitentiary in 1945. At this point, Mr. Eugene Bernstein entered the matter for the first time. After visiting DeLucia in the penitentiary and talking with the Agents, Mr. Bernstein filed the necessary papers to contest the claim in the Tax Court: The following is shown in the Ruggaber Report (246):

Summary

Income Tax

Year	Deficiency	50% Penalty
1935	$10,571.80	$ 5,285.90
1936	34,614.75	17,307.37
1937	42,678.61	21,339.30
1938	6,124.43	3,608.16
1939	none	none
1940	48.40	none
1941	53.00	none

Income Tax

Net deficiency	$ 94,090.99
50% penalty	47,540.73
Total	141,631.72

These tax figures were computed after Agent Ruggaber made the adjustment and decreased the amount on which DeLucia was to pay taxes, to about $227,000 instead of about $404,000.

To illustrate, please look again at the above summary where we find

Summary

Year	Income Tax Deficiency	50% Penalty
1939	none	none

Now if we examine the Ruggaber Report further, we find that the total sum received by the group for 1939 was $189,233.59. After division, 2/9ths to each, to Campagna, Nitto and DeLucia, the Agent assumed that each of the three obtained $42,051.91, by extortion in 1939. Campagna and Nitto were charged on this as additional income. DeLucia was not charged, because for 1939 petitioner had paid taxes on $73,058.17, designated in his income tax return for 1939 as "Miscellaneous". Agent Ruggaber regarded this $73,058.17 as having been made up in part as proceeds of the extortion. We quote from the testimony of Agent Ruggaber (125):

"Mr. Barnett: Q. Mr. Ruggaber, I hand Schedule A. Will you read us what is shown there?

Agent Ruggaber: A. World Playhouse Amusement Corporation, $1,000. Miscellaneous, $73,058.17, for a total of $74,058.17.

Q. With respect to your examination, what was the total amount of extortion funds which you found available to the group for the calendar year 1939?

A. $189,233.59.

Q. Did you consider that Paul DeLucia had received two-ninths thereof?

A. I did.

Q. What was that figure?

A. $42,051.93.

Q. How did you treat that in your report?
A. I did not make a change for the year 1939.
Q. For what reason?
A. For the reason that miscellaneous income reported exceeded the amount of distributive share shown by my schedules.

Revenue Agent Klein testified to having examined DeLucia, his books and his returns for 1938 and 1939. We quote (171):

Mr. Barnett: Q. Did you have any further conversation with him about the entries in the books?
Agent Klein: A. Well, I did ask him his source of income.
Q. What did he say to that?
A. And if he could show where it came from, and he said his source of income was various things, that he gambled.
Q. Was what?
A. He was gambling.
Q. Anything else?
A. Oh, I think he explained his gambling, he said he gambled on the horses, the races, and sports, and things like that?

A tax claim based on the Ruggaber Report similar to the one made against DeLucia in 1945, had been lodged against Campagna, a co-defendant in the New York case, who also was in the penitentiary. The Agents did not reduce the share alloted to Campagna. The Agents assumed that Campagna had put his entire share in his pocket. That Campagna had reported none of it. There were no items on the returns rendered by Campagna such as "Miscellaneous". Campagna identified the source of income on which he paid taxes. None of it was identified as coming from extortion or the matter involved in the New York case with Bioff and Browne.

In his Report and in the 90 day letter there appears the following assumption as to Campagna (Exhibit C-5)

Year	Louis Campagna 2/9ths interest
1935	$ 44,757.04
1936	83,899.53
1937	124,446.61
1938	73,827.75
1939	42,051.91
1940	35,910.98
Total	$404,893.82

These claims were compromised, for less than the amounts designated in the 90 day letters to DeLucia and Campagna, while the prisoners were still in the penitentiary. During the negotiations and at the time of the settlement DeLucia and Campagna had pending an application for parole. The settlement was negotiated between Mr. Bernstein and Attorney Marsh, (144) acting for the Government. Mr. Marsh testified (153) that he refused to settle one case without the other. Further that he required that the money had to be paid "cash on the barrel head" into his office, before he would consent to consummate the deal. We quote (154):

Mr. Barnett: Q. And was the settlement that you and Mr. Bernstein agreed upon, based upon, in so far as income,—was it $227,000?

Attorney Marsh: A. It was approximately one-half or around one hundred and fourteen thousand which was the additional income that we agreed to settle the case on.

Q. I see. Now, are the terms of that settlement incorporated in Government Exhibit 61, the stipulation?

A. The effect of it is. The adjustments aren't shown. The stipulation shows only tax liability but this is the effect of it, yes.

Q. It doesn't show income on it?

A. It shows no income. It shows only tax assessed and paid and amount due.

Q. Now this agreement with Mr. Bernstein was reached in March of 1946, was it?

A. It was. It was conditioned, however—I made it clear to Mr. Bernstein that any agreement that we reached was based on payment of the money; that if there was no payment, there was no agreement—it had to be paid.

Mr. Marsh testified (156) that when petitioner, through Mr. Bernstein, agreed to pay his total liability that that left no basis for liability on the part of Mrs. DeLucia. So therefore property in the name of Mrs. DeLucia was released from liens as a part of this settlement (155).

We quote from the cross-examination (159):

Mr. Stewart: Q. You have already enumerated to Mr. Barnett some of the things that you considered in determining whether this was a case for settlement or not, isn't that right?

Mr. Marsh: A. Yes sir.

Q. There are times and there have been times in your experience when the agency has sent out a deficiency notice with a certain amount in it, and you felt you could collect the full amount and you wouldn't take anything less, that is true, isn't it.

A. If it was justified, yes.

Q. Then there are other cases where you would take various things into consideration, and you think it is a good case for settlement, isn't that right?

A. That is right.

Q. And after you looked into this case and talked with Mr. Bernstein and looked over your files, you came to the honest conclusion as a lawyer and as an experienced man in that service that this was a good case for settlement, isn't that right?

A. I did.

Q. The first offer that was made to you by Mr. Bernstein was one that you rejected?

A. Yes, sir.

Q. When he finally got up to the offer that was finally accepted by you, you felt that that under all the circumstances was a reasonable offer, which the Government could very well take?

A. I did, and I so recommended.

Q. You were satisfied with it?

A. I was satisfied that that was as good as we could justify on the basis of the evidence. * * *

Q. Your position was that he got that money and he owed the tax on it, isn't that right?

A. I was satisfied he got some. I tried to get the facts as to what the extent of his participation in it was.

Q. If you had been in possession of proof which would satisfy you as a lawyer that he got $400,000 you would have stuck to that position, wouldn't you?

A. I certainly would have.

Q. Then when you looked over and found certain weaknesses in your case, you decided that the offer of fifty per cent was a pretty good deal for the Government, isn't that right?

A. Provided it was paid, yes,—tied in with Campagna.

Q. All right. We heard your conditions, and we would like to have that explained a little more fully to the jury. You put the condition on because you weren't going to settle for some judgment that you probably would have trouble collecting, isn't that right?

A. That is right."

An agreement was made to settle for 50% provided no penalties were asserted. (153) Petitioner's share of the money with which to compromise was figured to be about $114,000.

Your Honors will please keep in mind that if in fact petitioner obtained about $400,000 there was no case on the theory of net worth. There surely must be something wrong with a conviction where it appears that the only reason the Government didn't compel payment on $400,000 was lack of evidence to sustain a civil claim. After it had been settled, the Government then is able to use the hearsay Report, with no evidence as a fact of $227,000 received and no more, in a criminal prosecution where the proof must be stronger not weaker. The Government waived the 50% penalty in order to obtain the "cash on the barrel head" and then reopened the matter in order to exact a criminal penalty.

As we proceed with our argument we expect to set out instructions refused by the Court. We realize that if we claimed here that it constituted reversible error for the Court to refuse the following two instructions (Nos. 147 and 148) Your Honors would immediately note that they are a bit argumentative and the Court did not err. But we have another object. We expect to show that the instructions given at the request of the Government were misleading. Ours may have helped the jury to understand the law applicable. We seek to demonstrate a culminating effect of numerous errors.

The Court Refused the following instructions tendered by petitioner (No. 147, p. 605) (No. 148, p. 606)

147 In arriving at the compromise and settlement agreement of the tax and penalty liabilities for the years involved the parties made concessions in order to arrive at a final agreement. There is a rule of law that neither party to a compromise agreement or consent judgment will be permitted to repudiate it. This policy requires that the Government, as well as De Lucia, be held to its agreement. The Government officials can not take a position which is to their ad-

vantage in one year and then change their position in a later year when they find it to their advantage to do so. The policy of the law has always been to promote and sustain settlements. The compromise and settlement ought not to be overthrown, even if the party complaining of it surrendered rights that the law, if appealed to, would have sustained.

148 The purpose of the statute authorizing settlements is to enable the taxpayer and the Government finally and completely to settle all controversies in respect of the tax liability for any previous taxable period and to protect the taxpayer against the reopening of the matter at a later date.

Later, after petitioner secured parole, the Government collected from DeLucia about $30,000 as a gift tax, on the claim that the $114,000 had been a gift made to petitioner. The Government called Agent O'Hanlon (501) to explain, over objection, this transaction and introduce a transcript of an interview with DeLucia in 1950. DeLucia told Agent O'Hanlon, as is shown by the transcript that he expected to pay the $114,000 some day. He did not consider it a gift. (504) DeLucia told the various bodies that he could not very well inquire among former associates as to who paid the money for fear of parole violation. The gift tax payment came after the indictment years.

In order to comply with parole regulations, Mr. Bernstein opened and kept a set of books, which books are in evidence. (441) Exhibits A-1 and A-2. The Agents had examined these books before the trial. Mr. Bernstein also prepared the monthly parole reports. The reports were approved as rendered. DeLucia was discharged from parole on March 7, 1954. As a part of a preliminary motion Mr. Bernstein identified the books and introduced a number of charts and tables compiled by him as an expert (52 to 57). The charts prepared by Mr. Bernstein were not put

in evidence before the jury. The defense submitted them to the Court prior to trial, in an effort to require the Government to make some showing concerning the books, before resorting to the net worth method. These charts with the recapitulation were examined by the Agents during the trial. With the exception of a few minor differences, the Agents testified that they did not dispute Mr. Bernstein's figures.

We quote from the testimony of Agent Ruggaber (139):

Mr. Stewart: Q. I will show you what has been marked Defendants' Exhibit C, which has a heading on it, "Re Paul DeLucia, Summary of Income, Adjustments Thereto and Commissioner's Adjustments to Others."

I ask you whether or not you have seen that before?

Agent Ruggaber: A. Yes, sir, I saw that over the weekend.

Q. Are you prepared now, Mr. Ruggaber,—you see, I am not an expert in your line of work and you are, and as I listened to your testimony, it was along the line that this summary purports to summarize, isn't that true?

A. That is correct.

Q. Is there any difference in your report, your summarization, that you find between what you have concluded and what Mr. Bernstein has concluded in the report for you?

A. Yes, sir, a slight difference. • • •

Q. Will you point out the differences you find, if any?

A. For the year 1938 there is an item in here that says "Adjustment per Commissioner's ninety-day letter, redistribution of additional income." It is shown for the year 1938 as $16,877.80.

My adjustment was $14,000-something. However, whoever wrote the ninety-day letter went back to the original return as filed, whereas my report is based

on Revenue Agent Klein's previous examination, and the difference between $16,877 and the amount that I show as additional between income in my report is the difference that Mr. Klein set up.

The net result is exactly the same, where it says total of columns 2 and 3 hereof after Commissioner's adjustment. I have corrected income of $73,8[illegible] and so does this report here.

Q. Have you pointed out the only differences that you find?

A. That is the only difference as to Paul DeLucia.

Q. And that difference amounts to about $2,000?

A. $2,799.00 I believe, something like that.

Q. And then it winds up, if you analyze it further, it amounts to about the same thing.

A. Yes, sir. (141)*

One of these charts was an "Analysis of receipts and disbursements as shown on parole reports of Paul De Lucia," (Exhibit B) as prepared by Mr. Bernstein and is printed in the record, (56, 57). Mr. Bernstein and the Agents did disagree on the question of cash available in previous years. Mr. Bernstein, for the purpose of preparing some of his charts assumed that DeLucia received and had available the $404,000, plus the income reported as "Miscellaneous."

It is important to note the Government evidence as to just what Mr. Bernstein did say during the investigation in order to understand the use made of this after the prosecutor finished with twisting it around to include things not said. Your Honors need to understand the

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*Later in the trial there developed a difference over the treatment of two $40,000 loans made to DeLucia by Hugh Bennett. Mr. Bernstein had considered them as cash available. The Agent Saldana threw the loans out. There is no point in detailing the grounds of this dispute as the proceeds of the loans are not required, if our position be understood.

difference between the view of the law of evidence manifested by the District Court and that applied by the Court of Appeals. Also, Your Honors should bear in mind our point that the error of the District Court in this regard affected the entire case, not just Counts I and II.

Regional Counsel King testified (451):

> Attorney King: Mr. Bernstein told me that he had made a very careful study of the case, and that he was convinced that the available cash to Mr. DeLucia over the period from 1935 to 1950 was sufficiently large to explain the excess expenditures over his receipts in the years 1948 and '49 and 1950.
>
> He exhibited to me two summaries, one showing available funds from 1935 to 1950, totaling approximately $922,000 and another summary showing a figure of cash on hand as of January 1, 1948 of $300,000. Other additions to income during the years 1948, '49 and '50 and expenditures during those years with a net cash on hand figure of $51,000 at the end of 1950.
>
> These figures demonstrated, according to Mr. Bernstein, that Mr. DeLucia had sufficient funds on hand to account for his excess expenditures during the years 1948 and '49 and 1950 over receipts reported.
>
> I asked Mr. Bernstein if I could make a copy of each of those summaries, and he complied with my request.
>
> I had my secretary make a copy of each of them, and I marked them as copies, and they are part of my file." (452)

In preparation of a table, "Annual Recapitulation-source of funds—per Paul DeLucia parole receipts," Mr. Bernstein showed "Funds on Hand,"

			Annual Carry Over
1947	$28,334.69	1947	none
1948	15,459.45	1948	$23,986.26
1949	52,275.45	1949	1,966.25
1950	63,045.79	1950	26,815.39
		1951	52,767.90

There was no substantial dispute concerning the figures upon which this table was based. The Government experts, by reducing the "gross funds available" (Exhibit 181, p. 341), concluded that DeLucia did not have in his possession enough funds to cover the expenditures shown in his books and on his parole reports. DeLucia had reported that some of the money spent in 1948, 1949 and 1950 was from "funds on hand." The opinion of the Government expert Saldana (525) was that DeLucia had spent this money from unreported income received in each of the indictment years. This opinion was of no value because Agent Saldana assumed the correctness of Exhibit 181 (341) including the assumption that DeLucia had only $48,697.01 at the end of 1947.

In our effort to avoid confusion and to acquaint the District Judge with the facts concerning the books and the Parole Reports, we made a motion, in the absence of the jury, before any evidence was heard. Our motion was to require the Government to make some showing that the books were inadequate before the Judge would permit the use of the net worth method.

The Trial Judge permitted petitioner to introduce evidence (49) in support of this preliminary motion, over the objection of the prosecutor. We called Mr. Bernstein, who, as we have said, had carried on negotiations with the Agents. Mr. Bernstein was familiar with the claims made by them, as well as the expenditures, as reflected in the books. At this stage of the case, the books were identified as exhibits A-1 and A-2 (670). During the trial before the jury the books were put in evidence (441) Mr. Bernstein in the pre trial hearing also introduced and explained to the Judge the other exhibits here listed, (670, 671) and certified to the Court of Appeals. These exhibits include charts prepared by Mr. Bernstein including the following (670)

B-1 Analysis of Receipts & Disbursements by months for years September, 1947 thru December, 1949

B-2 Analysis of Receipts & Disbursements by months for year 1950

B-3 Annual Recapitulation—Source of Funds for years, 1947, 1948 and 1950

C Summary of Income Adjustments thereto and Commissioner's adjustment to other—for 1953 thru 1943

C-2 Certified copy—Ninety Day Letter to Paul DeLucia 5-1-45

C-3 Certified Copy—Ninety Day Letter to George E. Browne 3-5-45

C-4 Certified Copy—Ninety Day Letter to Frank Nitto-deceased 5-1-45

C-5 Certified Copy—Ninety Day Letter to Louis Campagna 5-1-45

All of the exhibits certified to the Court of Appeals have been ordered here in connection with the record.

Concerning the years previous to those covered by the Ruggaber Report, the income tax returns had been destroyed by the Government. However, the Revenue Service possessed a record of the various amounts paid by petitioner. From the list of totals Agent Mahon (323) testified, as an expert, to his opinion relative to the amount of income made by petitioner in those years. Where the record of totals showed no payment for a given year, the expert gave as his opinion that no income had been made for that year. In such calculation Agent Mahon assumed that petitioner had truthfully reported all of his income for such years. At the request of the Government the Court gave an instruction (No. 57,

p. 579) based upon the presumption arising as to income Agent Mahon assumed that DeLucia had no other funds available in addition to his reported income. The Court of Appeals said (herein p. 169):

> "The Government undertook to prove what assets defendant had on hand at the beginning of 1948 by means of showing his entire preceding financial history."

The Court of Appeals overlooked the difference between proof of assets and proof of income. A portion of this "entire preceding financial history" was reflected in the Ruggaber Report. The fact that this portion was based on hearsay was not noticed by the courts below.

It should be obvious to any one reading the record that the Government Agents were in no position to prove the financial history of petitioner in years prior to 1935. The record does demonstrate that the Agents undertook this task, or so pretended. Petitioner at no time made any financial statement. The assumption that DeLucia had no cash available, except that upon which he had paid taxes as income was destroyed by the evidence put in by the Government on another phase of the case. Hugh Garden, an architect testified (283) that petitioner in 1934 put up a large part of the $180,000 cash required to build an Italian Village at the World's Fair. The Government claimed that the books kept by Mr. Garden's firm showed funds traced to DeLucia amounting to $90,000 in cash. (G. 340)

On cross-examination of the expert concerning these years there appears the following, we quote (363):

> Mr. Stewart: You are assuming he paid honestly on every cent he made?
>
> Agent Mahon: A. That is the only inference I can make, that the man filed the proper return."

There was no evidence to support the opinion of Agent Mahon that DeLucia had nothing but the income on which he paid taxes.

There was nothing in the evidence to indicate that De Lucia had made any list of his assets for these years. Agent Mahon just assumed, without any evidence, that DeLucia had no capital. In order to further demonstrate to Your Honors the unreliability of the opinions expressed by Agent Mahon as an expert we show the manner in which he twisted the testimony and Report of Agent Klein.

As we have said, in 1940, Agent Klein (166) readjusted the income reported by DeLucia for 1938 and 1939, after an interview in which the agent examined the books then kept by petitioner. The Agent's Report shows (176, 178) various amounts designated as "Cash in Vault," "Cash in Pocket" and "Cash in Bank." Although Agent Klein had not said so, we feared that the jury may have obtained the impression that the interview and the Report may have indicated that petitioner said that these figures represented all of his cash, so we recalled Agent Klein. (242) We quote:

> Mr. Stewart: Q. Referring to the conversation you had with Mr. DeLucia, which you testified to yesterday, and that conversation took about three hours in your office, during that time did you ask Mr. DeLucia if the cash you were talking about as being on hand at any particular period, opening and closing, was all the cash that Mr. DeLucia possessed or had?
>
> Agent Klein: A. I did not.
>
> Q. You weren't concerned with that?
>
> A. No, it didn't affect me.
>
> Q. Your memory of the books, as you remember them now, did they reflect or say that that was the total cash that Mr. DeLucia possessed?
>
> A. Well, the books just reflected the cash in three categories.

Q. And they didn't say it was all the cash, did they?

A. No, there was no notation. Just the categories and the amounts."

Your Honors will note that the above answers cover both the conversation and the books. Now please observe the manner in which the expert falsified in order to support his table. First Agent Mahon claimed that he followed the testimony of Agent Klein, then he said he followed the Report. He followed neither. As in the case of the manner in which this expert just denied the existence of the cross-examination of Agent Ruggaber, this Agent told a falsehood about the record concerning Agent Klein and his Report. In the cross-examination of Agent Mahon, there appears the following (366):

Mr. Stewart: Q. I noticed as you were answering questions for Mr. Barnett that you referred to Mr. Klein's report and you read off some figures and you read them like as if that was the total cash, being cash-in-pocket, cash-in-vault and cash-in-bank, and you have given us your construction of Mr. Klein's testimony, haven't you?

Agent Mahon: A. I believe I followed Mr. Klein's testimony, sir. • • •

Q. All I want to know is that you are giving this jury your estimate of what Mr. Klein said, aren't you, and based on that you are concluding that Mr. Klein said that Paul DeLucia told Mr. Klein that that was all the cash he had?

A. I did not use the words "all the cash he had," Mr. Stewart. I said Mr. DeLucia told Mr. Klein that this was the cash he had and that he broke it down into three categories, sir.

Q. Yes, but it makes a lot of difference whether it was all he had or whether or not he had some more, doesn't it?

A. I gave him a very substantial amount, far in excess of Mr. Klein's figures, sir.

Q. But that isn't up to you, whether you are going to give it to him or not. It is a question of what Mr. Klein said. Mr. Klein didn't undertake to start you off with a place where Mr. DeLucia said this is all I have got. You don't understand Mr. Klein's testimony as such, do you?

A. I didn't use Mr. Klein's testimony to that extent, sir.

Q. Did you use it at all?

A. Only to the admission made by Mr. DeLucia as to cash on hand.

Q. Mr. DeLucia didn't tell Mr. Klein that that was all the cash he had, did he, according to the testimony?

A. From what I understand of Mr. Klein's testimony, Mr. DeLucia said my cash on hand is, and then he preceded to give him "cash in vault," "cash in bank" and "cash in pocket." That to me would indicate that that was his total cash on hand at that time, if that is your question, sir.

Q. That is right. That is your construction of Mr. Klein's testimony, isn't it, that you have just given us?

A. It is not a construction of Mr. Klein's testimony. It is a construction of what is shown in Mr. Kleins report.

I didn't refer to Mr. Klein's testimony, sir. I referred to Mr. Klein's report, which is in evidence and which speaks for itself. * * * I would say this: That the cash as indicated in Mr. Klein's report would indicate a statement of total cash on hand, sir, for the years 1938 and 1939.

Q. But Mr. Klein doesn't say that in his report, does he?

A. I would rather refer to Mr. Klein's testimony in the record, sir.

Your Honors will find Agent Klein's report printed in the record. (175) There is nothing in the report to warrant the opinion of the expert. The testimony of Agent Klein is to the contrary. (242) In a different case, without so

much confusion, misstatements and so many appeals to prejudice, it might be expected that a jury would give no heed to the opinion of this expert. In the case at bar, the Government was able to obtain convictions, in spite of the deliberate falsehoods shown. The lower courts gave no heed as to the utter worthlessness of the opinion of this expert.

Hugh Garden, an architect, testified (288) to having received large cash payments from petitioner, in 1934, for the purpose of paying contractors engaged in erecting the Italian Village. The Government introduced the books kept by Mr. Garden's firm to show that DeLucia had paid about $90,000. The following appears in the testimony of Agent Mahon (369):

> Mr. Stewart: Q. If you have overlooked important pieces of them, of course that lowers the value of your opinion, doesn't it?
>
> Agent Mahon: A. I don't believe that happened, sir.
>
> Q. Well, let's see if I can remind you of some place where it happened. How much cash did you say from your various figures, how much did Mr. DeLucia have at the end of 1934?
>
> A. At the end of 1934 I credited Paul DeLucia with no cash on hand, sir.
>
> Q. During 1934, what cash did he have available?
>
> A. His gross funds available during 1934 were $8,473.68.
>
> Q. Did you hear Mr. Garden testify here, the architect?
>
> A. Yes, sir.
>
> Q. Did you hear him say that $180,000 was spent in the Italian Village. Do you remember that?
>
> A. I heard Mr. Garden testify that the total investment was $180,000—

Q. And you heard Mr. Garden—

A. I am not finished, sir.

Q. I guess we all heard Mr. Garden's testimony.

A. But you didn't hear what Mr. Mahon has to say.

Q. You just throw that all out?

A. We did not hear Mr. Garden testify as to any investments made by Mr. DeLucia in any dollar amount, sir. He merely said that the total investment or cost of the Italian Village was $180,000 and I did not put any construction on what Mr. Garden said.

Q. But you must. You can't ignore the fact that Paul DeLucia had large sums of money, and some of it in thousand dollar bills, and brought it in and laid it on the table. You can't ignore that, can you?

A. We had not had any testimony as to what part of that money represented Mr. DeLucia's, if any of it did, sir. It certainly has not been used in our schedules as an expenditure.

Q. I know it hasn't been used in yours, but you don't regard that as his money because you have no evidence here that it was his money, is that right?

A. Because I could not prove that it was his money, sir.

The Italian Village went into bankruptcy later. From this fact the prosecutor argued that the $90,000 did not remain available to DeLucia. We quote from the argument (G. 340)

Mr. Barnett: Then you recall that we introduced the evidence concerning the bankruptcy of the Italian Village, showed the bankruptcy file. There are a couple of reasons for introducing the bankruptcy file. One of the reasons is this: Paul DeLucia apparently handled $90,000 in the year 1934. The bankruptcy file proves conclusively that he didn't get any of that money back. He didn't get any of that money back. It was a complete flop, a total loss. We don't know whose money that $90,000 was. We don't know how much, if any of it, belonged to Paul DeLucia. But whatever it is, it is money that went down the drain

> in that bankruptcy proceeding, and it is money that was not subsequently available to him for any purpose and could not have become a part of his cash on hand in any of these years that we have treated."

If the prosecutor did "not know whose money that $90,000 was" and his expert omitted it from his calculations why was the $90,000 proved in such detail? Just one of the many red herrings.

The bankruptcy file did not prove that DeLucia did not receive any of the money back. But even if it did, the District Court overlooked the significance of $90,000 passing through the hands of DeLucia in 1934. This showed the opinion of the expert Mahon to be worthless as evidence. Suppose that the defense had called Mr. Garden and produced the books of his firm to show that DeLucia had $90,000 in 1934 and this sum had not been considered by the expert. In such event, there may have been some sense to rebuttal evidence to show the bankruptcy. But to put in evidence and then to disown it, or try to destroy it, must be some new gimmick for use in net worth cases. Your Honors might compare this sort of juggling with the opinion of the same expert based upon the hearsay in the Ruggaber Report. Nobody ever saw any of the extortion money in the possession of DeLucia. The experts assumed that he received it as income with nothing to support the assumption but hearsay.

The Government produced an insurance agent, Michael Corcillo (292) from New York to prove that he had represented the company in the matter of bonds for DeLucia in 1943. Over $100,000 in cash was put up as collateral. This money was deposited by Mr. Bulger. The inference we suppose was that the money was put up by petitioner. If it were not the incident had no place in the evidence. If DeLucia had $100,000 to put up in 1943 the expert opinion of Agent Mahon was further weakened. In the face

of no evidence at all as to whether or not DeLucia had this $100,000 as "cash available" it can not be said that the Government had shown "his entire preceding financial history."

The Court of Appeals found that, (herein p. 170):

> "During the period 1944 to March 1954 DeLucia was either imprisoned or on parole and his returns for that period disclosed no income that can not be readily accounted for upon the face of the returns."

This period includes the indictment years, 1948, 1949 and 1950, during which time DeLucia was on parole. When it is observed that the returns filed by petitioner disclosed no income not accounted for, the issue is narrowed down to the requirement that the evidence must now show, directly, or by circumstances, that in 1950 DeLucia received income not reported by him in that year. There is no direct evidence to any such income. There is no evidence of any kind of any likely source of such income. So the case boils down to the question as to whether or not the circumstances proved establish these vital requirements of law applicable to the net worth method.

The circumstantial evidence is insufficient to prove a source of income not reflected in the books and parole reports, upon which DeLucia had paid taxes. As we expect to show, the prosecutor argued to the jury that the circumstances proved a source, but the facts proved did not support any such conclusion. The return for 1950 reports a loss of $9,838.82 (Exhibit 22, p. 101). The computation made by Agent Saldana (Exhibit 226, p. 532) shows a net income for 1950 of $61,915.14. If DeLucia had received such income during 1950, such receipt would have been a parole violation. This violation would have taken place whether the income not reported was derived from legitimate or illicit sources. There was no dispute as to the accuracy of the figures to be found in the parole

reports.* When the testimony of Agent Stonesifer (379) concerning the books is examined, it will be seen that the only complaint, applicable to the issues, was that Mr. Bernstein showed "funds in hand", without identifying them further than to indicate that they came from DeLucia's personal funds. The veracity of the books and parole reports was not disputed. As to the amounts shown to have been from "funds on hand", the Government claimed that the prosecution had proved that these "funds on hand" came from current income. Petitioner introduced no evidence on the subject and stood upon his demurrer to the evidence, claiming that the Government had not proved the receipt of any unreported income. Nor did the Government prove any likely source of unreported income. The regulations required earnings and other income to be specified and to be reported and approved by the parole advisor.

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* The following is the copy of the form used.

DEPARTMENT OF JUSTICE
Penal and Correctional Institutions

MONTHLY REPORT—PAROLE

Parole Executive,
U.S. Board of Parole,
Department of Justice,
Washington, D. C.

Date .....

.....
Print name here

Register Number.....

Sirs:

I respectfully submit the following report for the month of .....

My address is.....Telephone.....
Rt. or St. No. City or Town State

Mail Address .....

Have you changed your residence during the month? .....

If so, give date .....

Employer .....
Name of person or company Address

When petitioner was on parole in 1950, he was examined before the Kefauver Committee. The printed transcript of the Kefauver hearings is in evidence (Exhibit F.) The

(Footnote continued.)

Have you changed jobs during the month? .....

If not working, why? .....

Nature of your work ..... Number of days worked.....

If you have not worked regularly, what has been your means of support? .....

Have you been arrested during the month? .....

Convicted? ..... Sued? .....

MONEY RECEIVED		MONEY SPENT	
Earnings from employment	.....	Rent	.....
Other Income (Specify)	.....	Payment on Debts	.....
.....	.....	Other	.....
Money Borrowed	.....	.....	.....
Relief (Source)	.....	.....	.....
.....	.....	.....	.....
Total	.....	Total	.....

.....

Signature of Parolee

Advisor's remarks: .....

.....

.....

I have seen the above-named personally ..... times; The above report is ..... true to the best of my knowledge or belief.

.....

*Signature of U. S. Probation Officer

Date .....

.....

Signature of Advisor

Date .....

This report must be submitted in duplicate to the United States Probation Officer, whose name and address are on your instruction pamphlet, before the third day of each month following that for which the report is made. If no Probation Officer is indicated, mail reports direct to the Supervisor of Parole. These report blanks must be secured from the Probation Officer, two each month. No change in plans may be made without permission from the Probation Officer. *When possible, use reverse for report of contacts or attach a copy of chronological record.

portions offered by the prosecutor were read to the jury. (G. 256 to 292.) Counsel for the Committee and the Senators asked a great many questions concerning assets and income. When asked about how much money he had when he came out of the penitentiary, DeLucia said he had about $300,000 in cash. He was not asked the source of this money or how long he had had it. Although the prosecutor must have known that the Government would be unable to prove this self-serving statement to be false, he put it into evidence. The reason the prosecutor proved a self-serving statement about $300,000 will be clear to Your Honors after we demonstrate the manner in which this evidence was first misrepresented and then used.

DeLucia was also examined by the Hoffman Committee during the investigation of the granting of parole. A printed volume* of those hearings is also in the evidence. The $300.000 was not mentioned before the Hoffman Committee. DeLucia was not questioned concerning his income or assets.

During the investigation of income taxes for 1948, 1949 and 1950, the Intelligence unit of the Revenue Service wrote Mr. DeLucia a letter (406) requesting him to call at the office of the unit at a date set. DeLucia called, in the company of Mr. Bernstein and his present trial counsel. A transcript of that said there on September 1, 1954 was put in evidence by the Government (406). DeLucia was not questioned at that meeting, nor did he say anything. The Revenue Agents said there that they knew about the testimony of DeLucia before the Kefauver Com-

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*As is shown by this printed volume, Chairman Hoffman assumed that DeLucia and Campagna had extorted the money and demanded not only the revocation of the paroles, but restitution of the money.

mittee, concerning the possession of $300,000. The Agents said that that $300,000 had not been considered to date and that that was part of the purpose of the investigation. (422) That the testimony of DeLucia was not corroborated and they would like to clear it up. (424). When the matter reached the desk of the Government Attorney Joseph King, (448) in charge of "evaluation and disposition of criminal tax cases," another letter was written, requesting DeLucia to call. Petitioner did not answer. A copy of this letter was mailed to Mr. Bernstein, who responded and called upon Attorney King in 1954.

We quote from Mr. King (451):

> Mr. King: "I told Mr. Bernstein that the pertinent question in the case was the source of the expenditures over reported receipts. I told Mr. Bernstein that I was aware of the representations made before the Intelligence Division in behalf of the tax payer concerning the $300,000 and that I was very much interested in knowing the source of this alleged sum of $300,000, where Mr. DeLucia had kept it, if he had it, and any other defenses or contentions that Mr. Bernstein desired to present to me in behalf of Mr. DeLucia."

Later, on November 19, 1954, Mr. Bernstein called on Mr. King accompanied by Mr. Bulger. A transcript of the testimony given by Mr. Bulger was put in evidence by the Government (456). Mr. Bulger told Mr. King that he had seen $300,000 in possession of Mr. DeLucia. Mr. Bulger was also called before the Grand Jury which returned this indictment. He again gave testimony about the $300,000. A transcript before Agent King (Exhibit 196, p. 455) and before the Grand Jury (236 to 250) was put in evidence in the case at bar. This testimony was alleged to have been false and said by the prosecutor to be the key to this case.

(547) A substantial part of the case for the Government rested upon the claim of the prosecutor that the Government had proved a connection between the testimony given by Mr. Bulger relative to the $300,000 and the case against DeLucia. The District Court held that such connection had been proved. The District Court by instruction (No. 102, p. 588) assumed that this statement was made, that it was material and within the jurisdiction of the Revenue Service. The Court of Appeals held that there was a failure of proof (herein p. 165):

> "The Government in order to establish a connection between Bulger's testimony and DeLucia's intent to defraud relies on two points. The first is that at the Grand Jury hearing on DeLucia, Bulger testified that he had given the testimony before King at the request of DeLucia. DeLucia was not present at this hearing. A transcript of this was read into evidence in the trial below. DeLucia's counsel objected to the admission of this evidence in that it was not competent as to DeLucia. With this we agree. This evidence was perfectly proper as to Bulger under Count IV but as to DeLucia under Counts I and II it was nothing more that hearsay."

We respectfully submit that the Court of Appeals erred in not also holding that this was hearsay as to Count III. This is true because of the manner in which the prosecutor presented the case for the Government, the argument and the instructions. We expect to demonstrate to Your Honors from the record, that the prosecutor made use of his claim that the testimony given by Mr. Bulger was an important part of the case against DeLucia on all counts. Further we expect to show that the District Court, by reason of a mistake as to the law applicable, gave instructions at the request of the Government, to embrace the

erroneous theory of the prosecutor. At the same time, the Court refused instructions designed to protect De Lucia, if possible, against the use of evidence not admissible against petitioner.

If DeLucia had had a possible likely source of income other than that reported, such source would have been ground for a violation warrant.

Attorney King testified (452):

> "Mr. Bernstein told me that at the time of Mr. De Lucia's parole from the penitentiary, there had been a great deal of publicity, and as a result a number of Government agencies had been watching him; these agencies being the Federal Bureau of Investigation, in so far as Mr. Bernstein believed, the Immigration Service, and possibly the Treasury Department.
>
> He stated that people were following his every movement, cars were being watched that entered and left Mr. DeLucia's home, and that it was for that reason that Mr. DeLucia did not care to get in touch with the people who came forward and paid his taxes before he was released on parole.
>
> He pointed out to me that Mr. DeLucia felt that if he had communicated with those people that possibly those people would be the subject of Government investigation." (453)

The Court refused an instruction (No. 144, p. 604) tendered by DeLucia, intended to inform the jury that the law required him to comply with the rules of the Parole Board. The prosecutor said in argument to the jury (554):

> Mr. Barnett: "I think the inference is clear that his association remained the same throughout the period he was on parole, and he still had available to himself the same source of income, whatever that may be, that he had prior to the time he went away to the penitentiary."

The Court of Appeals said herein p. 170:

> "We think the jury could very easily have believed that DeLucia simply did not report his income from such illicit activities during the period that he was on parole, but did continue to receive such income out of which he made large expenditures during the years in question."

Without the slightest foundation, the Court of Appeals assumed the existence of evidence upon which the jury might easily believe this vital fact. The Court of Appeals makes no mention of any circumstances proved upon which to base this assumption, but the following, (herein p. 170):

> "During the period 1944 to March 1954, DeLucia was either imprisoned or on parole and his returns for that period disclosed no income that can not be readily accounted for upon the face of the returns. However, his return for the year 1954, which was the first year he was free of parole, reported $76,512 from 'Personal wagering at tracks, etc.' His 1955 return reported $86,050.92 from the same source and his 1956 return reported $78,460 from 'miscellaneous'."

When the prosecutor prodnced the 1954, 1955 and 1956 returns and read the amounts off to the jury, there was no indication of his purpose. In his argument, (554) he drew the inference adopted by the Court of Appeals. The District Judge refused an instruction (No. 144, p. 604) tendered by petitioner as follows:

> "144. During the period of time in which DeLucia was on parole, the law required him to comply with the rules of the Parole Board, including a regulation that he be not guilty of any crime or misconduct. During the period of parole the obtaining of money by means of gambling, or any other means in viola-

tion of the law, would have been regarded as a violation of parole. In the absence of any evidence to the contrary, it will be assumed that DeLucia, during said period, did not obtain money by means of gambling or any other unlawful means."

In his argument the prosecutor said, (551):

"And now, I would like to talk to you about this problem—it is not really a problem because if we have a tight starting point, as I think we have, it isn't necessary to do anything further. Once you show the expenditures, you are entitled to infer that those expenditures are from income received in the year in which the expenditures were made."

Your Honors will find that there was no "tight starting point." Then in argument the prosecutor went back to what DeLucia had said to the Kefauver Committee about not being allowed to associate with people he had previously associated with. (550) The prosecutor mentioned the argument made by Mr. Bernstein to Mr. King that DeLucia could not have any business operations because of the surveillance. The Government called Thaddeus Wilczak (515), a former employee of petitioner's son-in-law during 1948, 1949 and 1950. The son-in-law an Electrical Contractor had done work for the race tracks and book making establishments.

The prosecutor asked the jury to infer from the relationship (by marriage to his daughter) between petitioner and this son-in-law, that it must have been through the influence of DeLucia that these jobs were obtained. No other witness was called on the subject. The prosecutor merely assumed that the son-in-law obtained the contracts because of influence exerted by DeLucia. Such influence,

if it could be proved would have been a parole violation. We again quote from the argument (553):

> Mr. Barnett: "Then back in Chicago, the witness Wilczak testified to the influence of Paul DeLucia in getting contracts in connection with Sportsman's Park and various bookies."

The witness Wilczak (515) had not testified to one word concerning the influence of DeLucia. Your Honors will note that the prosecutor first puts in a bit of evidence calculated to raise a suspicion and then in argument claims to have proven a fact. The witness had called at the home of petitioner and had seen certain people in the home. From that fact alone the prosecutor drew the inference that petitioner had an income derived from dealing with those people. We again quote from the argument (552):

> Mr. Barnett: "After he was on parole, he met with Francis Curry and Tony Accardo, Hugo Bennet and others, whose names we do not know, met with them at his farm house in Kendall County, Illinois, met with them in his home in River Forest, Illinois, used influence to obtain work for his son-in-law, wiring the bookies in Chicago and Cook County, electrical wiring of booths, a Sportsman's Park man."

The following is copied from the testimony of DeLucia given before the Kefauver Committee (G. 270):

> "Mr. Robinson: James Curry, what business was he in?
>
> Mr. DeLucia: Curry is a land owner. He had a farm.
>
> Mr. Robinson: What else do you know about him? What other business was he in? Was he in the gambling business?
>
> Mr. DeLucia: No.

Mr. Robinson: What did he do after he left your place?

Mr. DeLucia: I don't know. I didn't see him anymore. I was told not to see him anymore.

Mr. Robinson: Who told you that?

Mr. DeLucia: Oh, my parole man told me. You see, when I came out, my lease with him expired in March, the next March, you see. So he said he come there and get his stuff, and he was around, and I was told that I shouldn't have anything to do with him.

Mr. Robinson: Didn't you know that he went into the gambling business?

Mr. DeLucia: No; I never saw him anymore."

Francis Curry rented the farm while DeLucia was in prison. Hugo Bennett was an employee of Sportsman's Park Race Track and a personal friend. Nothing was shown in evidence as to who Tony Accardo may have been. The attorney who handled the matter for Mr. Bennett testified to the preparation of mortgage papers in the matter of a loan to DeLucia. (474) The transcript of the Kefauver Hearings show that Mr. Hugo Bennett was thoroughly examined by that Committee concerning these loans and his dealings with DeLucia. Mr. Bennett was not called in the case at bar. Same as to Francis Curry, he was fully examined there but not called here. No attempt was made to account for the absence of these witnesses. The prosecutor drew an inference that DeLucia had an unreported income from insufficient facts. It is quite clearly indicated in the record that the inference drawn was contrary to the facts, if more of the facts revealed by the investigation had been put in evidence here.

Then in argument, the prosecutor pointed to returns made after DeLucia was released from parole. The large income reported under miscellaneous was used to create an inference as follows: (554)

Mr. Barnett:

"Mr. DeLucia's returns before and after the parole period show income sources such as gambling or miscellaneous. These things, I believe, lead to a fair inference that Mr. DeLucia while he was on parole never ceased whatever the activities were that produced the income for him prior to 1944, and he came out in the open on his returns with it after he was released from parole. But I don't think for a minute that he abandoned his old associates while he was on parole and then took up with them again after he came off parole.

I think the inference is clear that his association remained the same throughout the period he was on parole, and he still had available to himself the same source of income, whatever that may be, that he had prior to the time he went away to the penitentiary."

Judge Miller said in *United States* v. *Frank*, 151 F. Supp. 866, 870:

"Gambling does not give rise to a state of affairs presumed to continue once established; * * *"

The District Court refused the following instruction (604):

"143. Gambling does not give rise to a state of affairs presumed to continue once established. So if you believe DeLucia had income from Gambling in prior years, no presumption arises as to Gambling income in the indictment years, in the absence of evidence of Gambling in the indictment years."

The fact that petitioner's parole reports were approved and he was discharged from parole should carry considerable weight, where the Government, as here, relies upon inferences based upon inferences, conjectures and suspicion.

Judge Storey said in *Ricard* v. *Williams*, 20 U.S. 105, 7 Wheat 59:

> "And this, upon the plain principle, that every man should be presumed to act in obedience to his duty until the contrary appears."

Regardless of the opinion one may have concerning the character of petitioner surely he should be given credit for ordinary intelligence, if not more.

The Court refused the following instruction (No. 184, p. 616) tendered by petitioner:

> "184. When a mans' conduct may as consistently and as reasonably from the evidence be referred to one of two motives, one criminal and the other innocent, it is your duty to presume that such conduct is actuated by the innocent motive and not the criminal."

When Agent Mahon considered the record of taxes paid in 1934 and preceding years it was assumed that DeLucia had always obeyed the law. When it suits the Agents to do an about face they assume that he not only violated the law but risked a long term in the penitentiary.

If, as the Court of Appeals said, "the jury could very well have believed that DeLucia simply did not report his income from such illicit activities—" such belief was not based upon any evidence in the case. The Court of Appeals should not only have noticed the absence of evidence, that Honorable Court should have considered that DeLucia had a great deal at stake. It was necessary that he avoid illicit activities, or the appearance of any. It should be difficult for an unprejudiced person to believe that DeLucia would not only take in over $60,000 during 1950 from illegal sources, but that he would file an income tax return showing a loss and at the same time report to the Parole Officials large expenditures on the farm. During 1950, he knew

he had to remain on parole for years. He was not discharged until 1954. He knew when he filed his 1950 return that he was under investigation and that the various officials had plenty of time to check his returns and his records. He did not dare to refuse requested explanations, for fear that the Parole officials would regard his refusal as bad conduct and issue another warrant. To believe he would do all of these things knowing that about all of the Government Agencies and the Congressional Committees were looking for evidence upon which to put him back in the penitentiary for over seven years more, appears to be far-fetched. DeLucia knew very well from previous litigation, if not otherwise, that if the Parole Officials found evidence to indicate a parole violation petitioner would not be entitled to a trial in court. A hearing inside the walls of the penitentiary was all that he could expect. We expect Your Honors to agree that from the circumstances that DeLucia paid on a large income for 1954, 1955 and 1956, will admit of more than one inference. It is not reasonable to infer that such fact indicates that during 1950 he was receiving more income than he reported.

Why not infer that during 1950, because of the parole he stopped gambling and other such activities. He spent sums on improvements and equipment for his farm in the expectation that it would bring in enough income for support. Income that he could report to his tax lawyer for the purpose of keeping records. Income from a legitimate source which could be seen and checked by the officials. Such was the only conduct shown by the evidence. It was bad enough to find that the prosecutor indulged in what he thought, without any evidence. But it is difficult to explain how the Court of Appeals came to think the same thing, unless that Honorable Court lost sight entirely of the circumstances proved as distinguished from what had not been proven.

The prosecutor, over the objection of petitioner, introduced a line of immaterial evidence which no doubt confused the issue and prejudiced DeLucia. After DeLucia made an application for parole, the Chairman of the Parole Board called upon him in the penitentiary. During the interview DeLucia denied receipt of any of the extortion money (442). The Government put a witness, Gibson (472) a deputy warden, who had taken the history of DeLucia to prove that petitioner had not mentioned $300,000 to him. After petitioner was released on parole, the Hoffman Committee investigated the granting of parole. Before that Committee, DeLucia again denied the receipt of extortion money. (446) DeLucia was taken before the Grand Jury while on parole and there asked by the prosecutor if he had received this extortion money. The prosecutor put the denial made by petitioner into evidence in the case at bar. (490) After a warrant for parole violation was served and a writ of habeas corpus was issued,* the Government in its return relied upon the

*Your Honors take judicial notice of the record in this habeas corpus case and a printed copy is on file here. **United States ex rel. DeLucia v. O'Donovan**, 82 F. Supp. 435, affirmed 178 F. 2nd 876. Petition for Certiorari dismissed 340 U.S. 886. Companion case, **Campagna v. Hiatt**, 82 F. Supp. 435, Affirmed 178 F. 2nd 42. Affirmed by divided court, 340 U.S. 880, 107 F. Supp. 347. In the habeas corpus proceeding it never became necessary to try the issues as to whether or not DeLucia had received extortion money. The Government admitted the truth of the Traverse and maintained that sole jurisdiction was given by law to the Parole Board. This position proved to be unsound. The judges held that the Courts do have jurisdiction without waiting for an administrative hearing when it appears that a warrant has been issued arbitrarily.

warrant. In order to show that the warrant had been issued arbitrarily, DeLucia, in his Traverse, recited some of the history of his troubles with the Government. Among other things, he denied that he had received the extortion money. (442)

Then the petitioner was again examined before the Kefauver Committee where he also denied the receipt of any extortion money. (Exhibit 216, p. 510, G. 256) These denials may have been truthful insofar as the evidence discloses. Truthful or false, they had nothing to do with the charges made in the indictment. DeLucia never, at any time, claimed that the money he had spent, or accumulated, came from this extortion money. We complained in the courts below and asserted that the Government should not have been permitted to prove these denials as they were prejudicial and immaterial. We asserted that after the Government had predicated its case on the Report of Agent Ruggaber, including the claim that DeLucia had received the extortion money, the prosecutor should not be permitted to switch from that position. Particularly in view of the fact that in order to compromise, DeLucia had acceded to that previous position and the compromise had culminated into a judgment.

In his argument to the jury, the prosecutor revealed his purpose in blowing hot and cold, in proving by Agent Ruggaber the receipt of extortion money and at the same time proving denials. The prosecutor in closing argument pointed to one of the charts and said, (G. 311)

> "Mr. Barnett: I would like you to notice how Mr. DeLucia's rise in standard of living is keyed into the extortion income which he received, or which the Government has always contended that he received, for the period 1935 through 1940."

The prosecutor in his argument recited in detail the following from the evidence where DeLucia had said that petitioner had not received the extortion money. (G. 315)

1. In the petition filed in the Tax Court.

2. In his Traverse.

3. Before the Hoffman Committee.

4. That said by Mr. Bernstein when the settlement was made.

5. Before the Kefauver Committee.

6. He didn't tell the Warden Gibson of having money in the attic.

We quote (G. 318):

> "Mr. Barnett: Six times under oath Mr. DeLucia has denied that he had any part in the extortion money, six times under oath. * * * Ladies and gentlemen, the soul of the Biblical character Ananias resides within the carcasses of both of these defendants here on trial and the truth is a stranger. They tell any story that comes in their heads, that suits the convenience of the moment."

DeLucia had not testified at the trial nor had any statement made by him been introduced, except the self-serving statement about having $300,000 to the Kefauver Committee. The prosecutor had no right to call DeLucia a falsifier. Prejudicial argument is bad enough, but our main object in demonstrating its unfairness is to show Your Honors that the conviction was obtained because of the errors of the District Court and the Court of Appeals failed to notice. The prosecutor and the District Judge believed that under the law, DeLucia was responsible for that said by the lawyers and Mr. Bulger. The Court of Appeals perceived that this was error, but the Court of

Appeals failed to note that this error surely contributed to the conviction under Count III. It is clear that the prosecutor did not limit the above prejudicial argument to any particular count. How can a court of review say that a conviction would have resulted if the case had been fairly presented as to Count III?

The Government did not put these denials in the record to show that DeLucia did not receive extortion money. The denials could not be said to be proof of an inconsistent statement made by DeLucia out of court, for impeachment purposes, as there was no other statement made by petitioner to contradict or impeach. The Agent Mahon (341) and Sladana (525) assumed the availability of the $227,000 from extortion in making up their charts.

The argument of the prosecutor reveals that the evidence of denials was put in to serve a double purpose.

(a) To contradict the defense theory predicated on that said by Messrs. Bernstein and Bulger.

(b) To show that DeLucia is a bad man in general.

The Court of Appeals perceived that (a) was not proper as it made use of evidence not admissible against petitioner. The Court of Appeals erred in limiting this finding to Count I and II.

As to (b), in order to show Your Honors that (b) was one of the calculated purposes we quote from the final argument. (G. 425)

> "Mr. Barnett: Here is a man who for years has denied he had anything to do with the extortion money and now he wants to claim it. It is history.

He lied to Mr. Gibson in the penitentiary. • • •

He didn't tell him about the $300,000. • • •

He lied through his agent Bernstein and to his agent Bernstein about the receipt of the money when he was charged with it for tax purposes.

He lied in the Hoffman Committee hearings, he lied to the parole grand jury.

He lied to the Kefauver Committee about the receipt of the extortion money.

Are we to believe now that he had $300,000 in a tin box in his attic?"*

This is a man who finds it virtually impossible to tell the truth. It is easier for him to tell a lie than it is to tell the truth."

At the conclusion of the argument for new trial the District Court read from a

Statement made by the Court in answer to points made on motion for new trial

from which we quote (666):

By the Court: The jury has found defendant, Paul DeLucia, also known as Paul Ricca guilty on three counts. Defendant's own sworn testimony negatived his defense of his alleged $300,000 hidden cash. The jurors unequivocally manifested their disbelief by their three signed guilty verdicts."

There had been no sworn testimony given by petitioner about $300,000 *as a defense.* DeLucia swore to the possession of $300,000 in 1950 before there had been

* DeLucia never said at any time or place that he had $300,000 in a tin box in his attic. The Government proved that Mr. Bulger said that. The veracity of DeLucia was not an issue in the case. When the prosecutor said that DeLucia lied to Mr. Bernstein such argument is based on the fact that Mr. Bernstein had told the Agents that DeLucia had denied to him, Mr. Bernstein, the receipt of extortion money. Mr. Bernstein told this to Mr. Marsh during the negotiations for settlement.

any case to defend. The prosecutor conjured that up as a defense by charging petitioner with that said by others. Your Honors will note that the District Judge made this error as to all three counts. Although the prosecution had not established the fact that DeLucia had only $48,697.01, at the end of 1947, it is understandable that the prosecutor might argue that Mr. Bulger could not have counted $300,000 because DeLucia did not have that much. But such argument had its place, if any, in the conspiracy case. In the income tax case it is understandable that the prosecutor might argue that at the end of 1947 DeLucia did not have enough on hand to cover his expenditures in 1948, 1949 and 1950. If DeLucia had put in the defense falsely attributed to him and DeLucia had told the Agents during the investigation that his expenditures came out of the money counted by him and Mr. Bulger in the attic the picture would have been different. But here we have a case where the Government put in evidence the sworn testimony of DeLucia before the Kefauver Committee that when he came out he had $300,000. The Government was unable to prove that statement to be false. The Government was unable to prove that DeLucia had ever said anything different, yet he is called a falsifier because the prosecutor was permitted to erect a man of straw for the purpose of demolition.

The Court of Appeals failed to perceive our point. We fear that that Honorable Court failed to comprehend the issues and the evidence. The Court of Appeals said (herein) p. 172:

> "DeLucia also contends that the Government switched its position in regard to the alleged hoard of money that he had. However, with this we cannot agree inasmuch as it appears from the record that *the Government has always contended* that DeLucia did receive *a large sum through extortion* and that it has been taken into account in the itemization of DeLucia's

income. If anybody is changing positions, it is the defendant who has at times denied that he received the money and on other occasions *claims by innuendo* that this constituted the sum from which he made the various expenditures in the years in question." (Italics added.)

"A large sum through extortion" means nothing, unless the Court of Appeals could determine from the evidence just what that sum happened to be. The above holding overlooks the issue as to whether the Ruggaber Report was evidence as to the amount.

The Court of Appeals may have adopted the above phrase *"The Government has always contended"* from the argument of the prosecutor. That Honorable Court made no mention of the fact that the Government over objection introduced evidence of six denials. What was the prosecutor contending then? The Court of Appeals failed to answer our question *i.e.,* if the Government at the time of putting in these denials was not proving that DeLucia did not get the money what was the purpose?

The Court of Appeals, when that Honorable Court found that

> "* * * *the Government has always contended* that DeLucia did receive a large sum through extortion * * *"

was correct, if the position of the prosecutor be fully understood. The prosecutor put in evidence of the receipt of extortion money and intended that that should stand uncontradicted, so long as the jury would accept the figures composed by the Agents. The prosecutor put in the denials not as a change of position. The prosecutor took it both ways. The position of the Government was not to be affected by the denials but the denials were to be used to contradict the theory said by the prosecutor to be the theory of the defense. This theory was the straw man

erected by the prosecutor, on evidence not proper to consider against petitioner. Of course the Court of Appeals must have failed to perceive all of this, in holding that *"the Government has always contended"* that DeLucia did receive a large sum through extortion.

As to the finding of the Court of Appeals that DeLucia switched, there is no evidence to support this conclusion. Petitioner has always denied receipt of the extortion money. The only way one can conclude that DeLucia switched, is to adopt the erroneous theory of the prosecutor as follows:

(a) DeLucia denied receipt.

(b) Mr. Bernstein, during the investigation, indicated by innuendo that DeLucia received extortion money.

There can be no question about (a). DeLucia has always denied receipt. As to (b) the Court of Appeals has held that the prosecutor had no right to that position. DeLucia never uttered a word that could be taken as an *innuendo*. We expect to show that the prosecutor, in his argument, explained where he claimed the innuendo took place. We repeat from the above quote from the Court of Appeals:

> "• • • DeLucia did receive a *large sum through extortion and it* (a large sum) has been taken into account • • •"

The question is, *what sum was taken into account?* Please remember that as the prosecutor put the $300,000 into the case as something DeLucia lied about, the District Court followed this up by instructing the jury that the statements made by Mr. Bernstein and those made by Mr. Bulger were material. This certainly was applied to the case by the jury as to Count III. How can it be said that the error only affected Counts I and II? In other words, it was

assumed in the argument by the prosecutor that DeLucia was responsible for explanations made by others.

As we quote from the argument here and in the following pages, Your Honors will note of course that the record shows no objection. We chose to not object on purpose, as a matter of trial strategy. So we are not now basing our claim of error on the prejudicial argument. Not in the usual sense. Your Honors, reversed in cases where it appears that in argument, the prosecutor has taken advantage of his position. It becomes necessary to quote from the argument in order to show the position taken by the prosecutor. If that position is understood to have not been founded on evidence, proper to consider against DeLucia, Your Honors then will be able to see, not only the manner in which the prosecutor gained his guilty verdicts without proper evidence, but Your Honors will also be able to perceive the manner in which the District Court was deceived, and how the Court of Appeals missed the point. The false position taken by the prosecutor could have been rendered less harmful, maybe, if the jury had been properly instructed. So our complaint is directed at the erroneous instructions given and the refusal of ours. Really our complaint ultimately reaches our contention that the Court of Appeals failed to perceive that the issue was not that stated by that Honorable Court. The prosecutor spread the issue all over the lot. The District Court permitted such tactics in the giving of instructions tendered by the Government. Here again in the matter of instructions, the Court of Appeals failed to notice that the errors contributed to the conviction under Count III. As we have pointed out, the prosecutor used that said by Messrs. Bernstein and Bulger to Agent King as if DeLucia had said these things. The prosecutor said over and over that that said by others in the investigation constituted a statement

of our defense. In answer to the claim made in both lower courts that DeLucia was bound by statements made by Mr. Bulger in the presence of Mr. Bernstein, the Court of Appeals said (herein p. 165):

> "Secondly while it is probable DeLucia would have known Bulger's story to be false,* There is absolutely no competent evidence showing that DeLucia knew Bulger was to testify or had testified before Agent King. While it is true that Bernstein had been DeLucia's tax attorney for a number of years, this does not prove that DeLucia was informed of all that Bernstein did in relation to the former's tax matters. As to whether DeLucia told Bulger what to say and whether he intended that the story should be related to Agent King or at any other time is, from the competent evidence in the record, mere speculation. • • •"
>
> "We, therefore, hold that there was a total failure to prove a necessary element of the offense charged in both Count I and Count II; that the evidence is clearly insufficient to support the verdict of guilty as to those two counts; and the District Court erred in denying DeLucia's motion for judgment of acquittal on Counts I and II."

Yet the Court of Appeals did not notice that the prosecutor made use of that said on September 1, 1954 by the lawyers and that said by Mr. Bulger as if DeLucia had said it.

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*Here again, without evidence, the Court of Appeals assumes the falsity of the sworn testimony given by Mr. Bulger about the $300,000. In view of the holding by the Court of Appeals to the effect that that said by Mr. Bulger was not properly charged to DeLucia, it should not matter to Your Honors in considering this petition, whether it was false or true. We can be quite certain that the jury was not satisfied with the claim of the prosecutor that it was false. This from the not guilty verdict.

The prosecutor said in argument (547):

> Mr. Barnett: So, fundamentally, the key to the entire case is the truth or falsity of that story about the $300,000. The reason for this is this: If the story is true, we do not belong in this court room. If that story is true, Mr. DeLucia could have spent the money that he did spend in 1948, 1949 and 1950, out of that $300,000 hoard, and therefore it would not be taxable income to him during those years."

DeLucia has never said anywhere, or any place, that the $300,000 he claimed to have possessed came from extortion money. It could be said of the conspiracy case against Mr. Bulger and petitioner that the central issue as to Count IV was the existence or non-existence of $300,000. Your Honors will note that the prosecutor said that the $300,000 was the "key to the entire case."

In 1954, the Agents, by writing a letter to DeLucia requesting him to call, endeavored to force petitioner to take a stand about the $300,000. We quote from the above transcript (424):

> Mr. Stewart: If you are not willing to believe him when he said he had $300,000, if he said that over again now 300,000 times, repetition would not add anything.
>
> Agent Stonesifer: Let me say this: I have read that in reading the Kefauver Committee testimony.
>
> Mr. Stewart: Yes.
>
> Mr. Stonesifer: That's only the place that I have seen it.
>
> Mr. Stewart: Yes, and they asked questions to indicate—
>
> Mr. Stonesifer: Mr. DeLucia may or may not—I don't know—want to add to it.
>
> Mr. Bernstein: You are fortified in that because of this money.
>
> Mr. Stonesifer: I am not talking about money; I am talking about adding to the explanation."

This suggests that the Agents realized that more was needed by them in the way of having DeLucia take some definite position. DeLucia said nothing at this conference. So in the case at bar, the prosecutor tried his case as if *"the defense position"* was that the expenditures came out of $300,000, which had been counted in the attic by Mr. Bulger, as if DeLucia had said the $300,000 so counted was a part of the extortion money. *"The defense position"* was based upon a plea of not guilty. DeLucia had never said that the $300,000 came from extortion money, nor had he said anything about Mr. Bulger in connection with the $300,000. The Court of Appeals was no doubt deceived by an unfounded statement by the prosecutor, as to what constituted the *defense position*. This misconception caused the Court of Appeals to believe that a question for the jury was involved in a choice between $48,697.01 and the $300,000. If the record had been understood it would have been seen that that there were two questions for the jury:

(a) Was the starting point for the beginning of 1948 properly fixed at $48,697.01? Or to be more exact, was any starting point fixed for any amount for the beginning of any year?

(b) Did DeLucia have $300,000 in cash in his home at the beginning of 1948?

If the jury found (a) not proven, the jury never need bother with (b) as then the amount possessed by DeLucia at the end of 1947 was immaterial. If the jury believed that (b) was shown, the jury need not bother with (a) because if DeLucia in fact had $300,000 at the beginning of 1948, it did not matter how long he had it, or where it came from. That was enough to cover his expenditures for 1948, 1949 and 1950. The jury, if properly instructed, could very well have found neither (a) or (b) proven and

acquitted on all counts. The prosecutor, with the aid of the instructions, may have caused the jury to believe that a choice had to be made between $300,000 and $48,697.01. The finding of the Court of Appeals that an issue had been created for the jury between $300,000 and $48,697.01 should demonstrate to Your Honors that that Honorable Court was deceived by the manner in which the prosecutor had built his man of straw. If Your Honors comprehend, from the record, that the Court of Appeals misconceived the issue and consequently failed to require evidence of a starting point and a likely source, surely the judgment must fall.

On the motion for new trial the District Court said as to Instruction No. 102, (588) there referred to as No. 4, the following: (667)

> "The Court: I feel that the argument on the instruction on Count 4, if it hadn't been limited and confined to Count 4 in specific terms, might have had merit. But having been limited entirely to Count 4, and the jury having found both defendants not guilty on Count 4, it is of no consequence now as to what effect the instruction had upon them, although I still believe—and would give it again if called upon—that it is a perfectly sound instruction to give to the jury, pointing out the materiality of the very basis upon which the jury must pass, not as to whether the $300,000 was or was not there, but as to whether it is material to the issue in the case."

When the Court said "was there", His Honor, we believe, refers to the attic and the testimony of Mr. Bulger. The Court here said this was a jury question. But His Honor had taken that jury question from the jury.

After the trial which consumed only about two weeks, when the jury was about to take the case, the Trial Judge said, (602):

"By the Court: We could have wasted a year on figures and confused the jury and confused everybody, and probably in the end would have accomplished less than we have accomplished here."

Whether or not the jury became confused by the figures, we shall never know. The Court of Appeals has held that the District Judge failed to properly weigh the evidence, and lack of evidence, on some important applicable points of law. After Your Honors examine the instructions given at the request of the Government hereinafter set out, it will be seen that the jury had been misdirected as to the law. The District Judge had recently come to the Federal Bench from the State Courts. The Court gave the defense the benefit of the practice prevailing in the State Court by going over the forms of instruction tendered by petitioner (603) marking those not given as "Refused" and ordering that these refused instructions be made a part of the record. (600) The Court said that some of petitioners instructions were refused because in theory they were not consonant with the *Holland* and *Freidberg* cases (G. 302).

The prosecutor informed the Judge that he had gone over the instructions tendered by petitioner and had prepared one continuous charge * * *.

The record shows that after copies of the instructions tendered by petitioner were delivered to the prosecutor, the charge finally given to the jury was prepared by the Government (G. 305):

> Mr. Barnett: * * * "including and embodying among our instructions the instructions of theirs that we felt you would be warranted in giving, so the instructions you read could be read as one continuous sequence. That is the reason we included among our instructions many of theirs that we felt were justified and in the sequence we thought should be followed."

When the instructions were read by the Judge to the jury, the paragraphs were not numbered. By agreement afterward they were numbered. (629) Those prepared and so tendered by the Government are numbered 32 to 126 inclusive. (572) Those originally tendered by the defense and adopted by the prosecutor are numbered 1 to 31 inclusive. (566)

On the subject of circumstantial evidence, the Court gave two instructions at the request of petitioner (Nos. 12 and 13, p. 568). None of these given instructions supplied the rule of law to be applied where the Government seeks a conviction on circumstantial evidence alone. The Court refused instructions tendered by petitioner, based upon such a situation. (No. 140 p. 603; No. 160 p. 608; No. 179; p. 614 No. 180; p. 615) The Government did secure a conviction upon circumstantial evidence alone. There was no other evidence. We submit that it was error to refuse to instruct on the law to be applied in such a case. During a discussion between Court and Counsel relative to the instructions at the time of petitioner's motion for acquittal, there appears the following (543):

> "The Court: Let me add something that has been troubling me all through the reading of your instructions and the cases. I may be off base, but all the cases talk about circumstantial evidence. I don't agree with that in this case. You have got written reports every month to the Parole Board. You have sworn testimony before official bodies. That seems to take it out, in the main, from the circumstantial cases. At least, in a major part. There are some expenditures, yes, but in the main when you have written or sworn statements under oath covering the basis for expenditures, as you (Mr. Barnett) say this is an expenditure system, you remove it completely from the circumstantial group. You put it into a more direct evidence"—

This error on the part of the District Judge might be explained in part by a misconception of the dispute about the Parole Reports. The Judge said (545):

> "The Court: Do not these reports indicate income *or lack of income* as well as expenditures?" (Italics added.)

The income indicated on the Parole Reports was not disputed by the Government. Of course DeLucia did not report any income from an illicit source. The income he did report was identified as to source and was thoroughly checked. The expenditures indicated on the Parole Reports were not questioned either. The Parole Report did not show *"lack of income"*. If they had been of such nature, DeLucia would have been back in the penitentiary on violation of parole. Balances were struck by Mr. Bernstein in the books. An addition of the expenditures did not exceed the funds shown by the books to be available. The Parole Reports did show that expenditures could not have been made from current income alone. They showed that some of the money came from "funds on hand." The prosecutor claimed that the evidence outside of the books, the charts prepared by the experts showed that at the beginning of the indictment years, DeLucia did not have sufficient money in his personal account to cover all of the entries designated as "funds on hand." If this was proved at all, it was proved outside of the Parole Reports by circumstantial evidence. So the Parole Reports, if properly understood did not make a direct evidence case out of this circumstantial evidence case. Of course the District Judge knew the difference between direct and circumstantial evidence. The confusion was created by the prosecutor, who claimed that the Government did not need proof of the circumstances, said by Your Honors in the *Holland* case

to be necessary to a net worth case. The prosecutor claimed the right to rely upon an alternative method. We expect to show that there was no foundation in the evidence for any alternative.

The Court overruled the preliminary m. on concerning the books made by petitioner. The Government, after an opening statement, proceeded with evidence. When the Government reached the witness Agent Stonesifer, the prosecutor made an attempt to show inadequacy. This Agent had examined the books before trial. Agent Stonesifer expressed an opinion that the books were inadequate. We quote (386):

> Mr. Barnett: Q. Now, were you able to verify whether or not the 1947, 1948, 1949 and 1950 returns of Mr. Paul DeLucia were prepared from these various books which you have testified to?
>
> Agent Stonesifer: A. Yes I was.
>
> Q. And were they prepared from those books?
>
> A. Yes, sir.
>
> Q. Now, you have stated that the books were inadequate to reflect a net taxable income?
>
> A. Yes, sir.
>
> Q. For what reasons were the books inadequate to reflect net taxable income?
>
> A. Well, the cash receipts credited to Mr. DeLucia's personal account in the ledger did not indicate the source from which they were received. Another thing, the opening cash balance on hand was not recorded on the books. That is, the cash on hand that Mr. DeLucia may have had. The fact that the date, the written data, checks, and so forth, check stubs, were not available to support the records from which it was prepared, made it incomplete because the records couldn't be verified as being accurate. Then, there were sales of some farm products which the books didn't show who the products were sold to; they just said the nature of the income, such as "Dairy in-

come" and similar items. Then, as I recall, there were also some disbursements which the books did not show who received the money, who the payee was.

Those were the respects in which I considered the books inadequate to determine the correct taxable net income.

Q. Were the canceled checks at any time made available to you?

A. No, sir, they were not.

Q. Would that have a bearing on whether the books were adequate also?

A. Yes, it would.

Q. What bearing would it have?

A. Well, it would verify disbursements as to who received disbursements. In cases where the payee was not named on the books, it would also verify that the payee named on the books was the one who received the cash and received it in that year and in that amount.

Q. You made reference to opening cash not being set up on the books?

A. Yes.

Q. Under what circuinstances would it have been necessary to set up opening cash on the books?

A. Well, in the absence of the substantial cash receipts being recorded, without any source of those receipts being shown, it would be necessary to have an opening cash balance recorded and to know the source of that opening cash balance.

If this claim of inadequacy be tested by the books and the evidence, it will be found inapplicable to the issues in the case at bar. The source of the money was indicated from "funds on hand" in the parole reports. Agent Stonesifer called them "cash receipts". They were not designated by Mr. Bernstein as "cash receipts" in the sense that they were current income. Not being income for 1948, 1949 and 1950 and no claim having been made other than the fact that the funds were capital, the source was imma-

terial. The "source" took place in years previous to 1948, 1949 and 1950, so it should have been no concern of the Agent, except that he may have been disappointed to not find evidence to support an indictment for 1948, 1949 and 1950. We quote from the cross-examination (401):

> Mr. Stewart: Will you agree with me that accountants—you have already told me different accountants have different ways of going at this business of keeping books. Would you agree with me that accountants, being expert as you are, might differ in opinion as to whether or not the books are adequate?
>
> A. Well, adequacy for accounting could be an entirely different thing than adequacy for income tax purposes.
>
> Q. And adequacy from the standpoint of the taxpayer could be adequate from his standpoint and yet unsatisfactory to use in an investigation, isn't that true?
>
> A. Well, unsatisfactory to me as an Internal Revenue Agent, yes, sir, for the purposes for which I was looking at them.
>
> Q. Yes, you were looking to see if you could find more income that possibly hadn't been paid on, isn't that right?
>
> A. No, sir, I was interested in the source of any cash receipts on the books in order to determine whether it was income or was not income."

Your Honors will find that the checks, check stubs, money paid and received as to the farm and such matters were not in dispute. There is no claim that DeLucia had any unreported income for those years, as to the matters recorded in the books. Surely the Agent did not call the books inadequate because he did not find illicit income there recorded, or the extortion money listed as capital.

It must be remembered that the books were kept in order to satisfy the parole officials, concerning the correctness of any item reported on the parole reports. If the

parole officials required DeLucia to give further particulars as to what was meant by "Dairy income", or if the parole officials questioned an expenditure, details could be supplied. This claim of inadequacy made eight years after the entries were made is obviously an afterthought. If all of the evidence be understood, it will be observed that the Agents never questioned the accuracy of the books or parole reports, insofar as those exhibits purported to give information as to income and expenditures. The parole reports showed living expenses as required. The books did not show living expenses as the books were kept also for the purpose of preparing income tax returns.

On cross-examination (398) Agent Stonesifer admitted that he had not included in his Reports made in previous years at the time of the examination of the books anything about finding the books to be inadequate. Nor did the Commissioner, as far as he knew, make any finding on the subject.

During the trial, as appears from the testimony of the Agents, the Agents went over the exhibits introduced by Mr. Bernstein. Aside from a minor differences, involving not over $2,000 (which were explained and did not change the picture), the Agents did not question the accuracy of the figures submitted by Mr. Bernstein. (139) A study of the entire record in the case at bar, will demonstrate that Mr. Bernstein took practically the same figures used by the Agents and came out with a surplus of cash available, for expenditures in the indictment years. As we have said, the Agents came out with a shortage for 1948, 1949 and 1950. Mr. Bernstein even assumed, for the purpose of making his tables, that DeLucia had nothing as cash available at the end of 1934. Mr. Bernstein assumed, for the purpose of making the charts introduced on our preliminary motion, that DeLucia had available during 1935

to 1941, about $404,000. This figure was based upon the 90 day letter, which in turn was founded on the Ruggaber Report. (245) The Agents took the figure $227,000 from the same 90 day letter report, after the adjustments mentioned above and explained by Mr. Ruggaber. The Court of Appeals said (herein p. 168):

> "DeLucia also contends that where he himself kept a set of books and records the District Court erred in permitting use of the net worth method of proof. This would mean that simply because taxpayer has kept a set of books, the veracity of which is in question, the Government is estopped from going beyond those books to prove their falsity or inaccuracy. This is absurd."

The veracity of the books was not in question, unless Your Honors hold that books kept for the indictment years are required to show cash on hand at the opening and the source of capital acquired in previous years. The Court of Appeals has misconceived our point. We did not ask the District Court to bar the books absolutely. We requested the Court to rule that before the books be disregarded for another method, the Government be required to make some showing of inadequacy. It is apparent that in the investigation made by the Agents, information to be found in the books and reflected in the parole reports, was used as a foundation. The Agents have never questioned the accuracy of the entries to be found in the books, or on the parole reports. It is true that Agent Stonesifer was not satisfied with the entries made to show money coming from a personal cash account. But that was not claimed to be a false entry. The money did come from cash on hand, insofar as the evidence shows. The Agents wanted to know just where DeLucia obtained that money. The point missed by the Court of Appeals is this—the District

Court should have compelled the prosecution to make a showing. The prosecution made its showing later. The District Judge should have done either one of two things, after all of the evidence was heard, *i.e.*

(1) Grant the motion of acquittal on the ground that the net worth method was not applicable in the face of accurate books.

(2) Leave the question to the jury under proper instructions.

The District Court did neither, (1) The Court denied our motion for acquittal and (2) the Court erroneously instructed the jury, at the request of the Government and refused proper instructions tendered by petitioner. The Court gave the following (No. 94, p. 586) on motion of the Government.

> 94. On the question of intent to evade, and just by way of illustration and not by way of limitation, there are certain matters which you could consider pointing to intent so far as tax evasion is concerned if you found they existed in this case. These are general illustrations: Concealment of assets, covering up sources of income, handling one's affairs to avoid the making of usual records, and any conduct the likelihood of which would be to mislead or conceal. And if the tax evasion motive plays any part in such conduct, the offense may be made out even though the conduct I have mentioned might also serve some other purpose."

There is no evidence of "concealment of assets." The expenditures recorded in the books as having come from "funds on hand" were said by the Government to have come from current income. This would be just the opposite of claiming assets where no assets existed. There was no source of income to cover up. Surely there was no evi-

dence that income for 1948, 1949 and 1950 was covered up. It was spent and the expenditures were fully recorded. There was no evidence of "conduct the likelihood of which would be to mislead or conceal." There was no evidence that DeLucia handled his affairs during 1948, 1949 and 1950 to "avoid the making of usual records." There is nothing unusual shown about the records as they pertained to the farm and such things recorded in the books. There is no evidence that DeLucia had any affairs to handle during his parole except those properly recorded. The instruction (No. 94, p. 586) may be sound law as applied to some other case. Here it was misleading and not applicable.

The Court refused the following (Nos. 153, 154, and 155, p. 607; and No. 163 p. 609):

153. In an income tax evasion prosecution wherein the Government intends to show tax evasion by evidence of taxpayers receipts and expenditures, the burden is upon the Government to show, before resorting to another bookkeeping method, the inadequacy of the books employed by the taxpayer.

154. The Government must introduce evidence, other than its own computations, to discredit books and records of taxpayer such as proof of unrecorded transactions or internal evidence within books themselves showing incompletness or inaccuracy.

155. The Commissioner of Internal Revenue has discretion to use a method other than the bookkeeping method regularly employed by the taxpayer only when such method employed by the taxpayer does not reflect the true income.

163. If the figures in the books kept for DeLucia are correct the books are sufficient to show net income. Of course the books on their face are not conclusive of the proper figures. If not accurate, whether by inadvertence or fraud, such fact could have been

shown on behalf of the Government by other evidence. But in the absence of other evidence of inaccuracy—you will regard the books and the figures entered therein for expenses and upon which to calculate net income as substantially correct.

Mr. Bernstein testified during the preliminary hearing out of the presence of the jury, after describing the books (50) that the books were correct and accurate and that he used them in preparation of the parole reports and the income tax returns for 1948, 1949 and 1950 (51). Agent Klein (169) described the books kept by DeLucia for 1938 and 1939:

Agent Klein (171): A. * * * he explained his method of bookkeeping was to put the money that he received into the vault, and whenever he took anything out he put a slip of paper in, what he took out, or a bill that he paid, and then those items would be entered into this book, as disbursements, or expenditures * * * I asked him if he kept any records of his gambling gains and the source of those gambling gains, and he said, "No."

Mr. Stewart: Q. And when he told you that that is his method and it had been his method in previous years, you didn't raise any objection to that method, did you?

A. You couldn't raise any objection to that method.

Q. As a matter of fact, you had seen that method adopted by other people who had income which they just preferred to put under the general heading of "Miscellaneous," isn't that right?

A. That is right.

Q. And the Government took the position that so long as the Government got its money, it didn't care where the taxpayer got it from?

A. Well, we always did ask the source.

Q. But you didn't always get the information?

A. No, we did not get the information.

Q. And, if you didn't get the information, you would go ahead and compute the tax as best you could from what information you had?

A. That is right.

On cross-examination Agent Stonesifer said (403):

Agent Stonesifer A. Well, my knowledge of the use of the word "bank roll" was in connection with the investigation of bookmakers returns, horse racing bookmaker's returns. They would operate at a location where they would take in money for bets and pay out on winning bets, and on hand at that location they would keep an amount of cash with which to finance these activities, and that to my knowledge is what they referred to as their "bank roll".

By Mr. Stewart: Q. You examined books kept in that manner as best you could in your duties as a Revenue agent, didn't you?

Agent Stonesifer: A. Yes, I examined the returns of the people in that business.

Q. Although you were not very well satisfied with that method of keeping books, you did check the return with what you could find, isn't that right?

A. I would check the returns with whatever records they had, yes, sir.

Q. That is right, and merely because these records don't please you or suit you, there is nothing much you can do about it unless you recommend some action to your superiors, isn't that right?

A. There is nothing I can do about past records, that is true, that have been made, I can recommend future action."

The prosecutor said in argument (G. 420):

Mr. Barnett: "In other words, those people are above the law. They can report what they feel like reporting. The rest of us have to pay our taxes. The man that is in business, that keeps books, he has got to make them available to the tax collector and show him where his source of income is."

It is not correct to say that people are above the law under the circumstances. They desire to pay their taxes, but do not wish to furnish evidence of illegal conduct. It is not true that the man in business must show his source, unless he claims money received in the year to be non-taxable. This appeal to prejudice was all the more reason why the Court should have given some of the refused instructions. The Court refused to give the following instruction offered by petitioner (No. 211, p. 625):

> 211. No statement as to any other transaction other than those contained in the indictment, upon which the defendants are being tried are to be considered by you as evidence of guilt in this case, and should be entirely disregarded by you in deliberation on the guilt or innocence of the defendants.

When the prosecutor argued concerning the manner in which people report what they feel like reporting, and compared bookkeeping methods to business men's books, the jury may have understood this to also apply to the books kept for 1938 and 1939. DeLucia was not on trial for those years. Agent Klein accepted the books for what they were worth and adjusted the income. DeLucia paid the additional tax and that should have been the end of that insofar as the books are concerned. Agent Mahon, as an expert, assumed the truth of the figures reflected in the books as adjusted by Agent Klein. DeLucia was not on trial for having kept inadequate records in 1938 and 1939.

In order that we may show the manner in which the prosecutor shifted the burden of proof to petitioner by pretending that DeLucia had made previous explanations as to where the money came from to cover expenditures, we first examine the testimony given by Attorney King who said that Mr. Bernstein had submitted two summaries

showing available funds (452). These summaries were copied by Mr. King and placed in his file. Mr. Barnett assigned the following designation to copies of these summaries, (453) "Government Exhibit No. 195." When the defense made an objection to the introduction of these summaries, Mr. Barnett withdrew Government Exhibit No. 195 (455). So the summaries are not in evidence. Yet when it came to the closing argument, the prosecutor treated the summaries as if they were in evidence. That is not the only error. If our complaint were based only on the fact that Exhibit No. 195 was not in evidence we would not even mention it. The prosecutor argued that these summaries constituted an explanation made by DeLucia. Our point here is that when the Court of Appeals held that the District Court erred in holding DeLucia responsible for that said by Mr. Bernstein, the Court of Appeals should have noticed the manner in which the prosecutor had built a man of straw, by claiming that the law made DeLucia responsible for that said by Mr. Bernstein. The real harm did not flow from that said by Mr. Bernstein. It was the manner in which the prosecutor used this. The prosecutor claimed that this was our defense. Further that in view of the fact that the Government had proved the defense as false, the prosecutor was relieved by law from showing a starting point or a source. We quote from the closing argument (G. 318):

> Mr. Barnett: "The closest we ever come to having an admission by him (DeLucia) that he received any part of the extortion money is when Mr. Bernstein went into Joseph B. King's office, the Regional Counsel of the Internal Revenue, and submitted two financial schedules. At that time, Mr. King was permitted by Mr. Bernstein to copy the financial schedules which Mr. Bernstein had shown Mr. King and to which he had alluded. One of those schedules was a document

prepared by Mr. Bernstein which Mr. Bernstein said would show that Mr. DeLucia had available resources at the beginning of 1948, from which these expenditures could have come, and, that document within its body states 'two-ninths additional income, four hundred and four thousand eight hundred and ninety-four—and he has nine cents and we have thirteen cents. He wouldn't call it extortion money. He said 'two-ninths additional income' though the figure is practically identical. That is as close as we ever come to hearing that Mr. DeLucia had received any of this extortion money.

Mr. Barnett: How is it possible for Mr. Stewart now to suggest that he would have gotten considerably more than the four hundred thousand that we credit him with having received? * * *"

The prosecutor had no right to say that this statement by Mr. Bernstein was proof that DeLucia had said that petitioner had received extortion money. Mr. Bernstein, acting as a lawyer, was trying to dissuade Attorney King from recommendation of criminal action. In his argument, Mr. Bernstein took figures from the 90 day letter and tried to convince Mr. King that if such figures be taken as true, no case could be proved by expenditures. We trust that we have explained the manner in which Agent Ruggaber arbitrarily reduced the $404,000 to $227,000. So Your Honors must understand that when the prosecutor said that the Government had given DeLucia credit for having received $404,000, this statement by the prosecutor just was not true. In the chart (Exhibit 181, 341) Your Honors will find in the fourth column under the heading "Unreported Extortion Income" a total of $227,781.46.

We quote further from the argument (G. 314):

Mr. Barnett: "Now I want to say further word about that $404,000 of extortion money. We say that we have given Mr. DeLucia in our computations in the

case full credit for every dollar of extortion money that he could ever have received based upon the testimony at the extortion trial at New York."

This is an irresponsible statement based upon hearsay. Now we trust that Your Honors will perceive some of our reasons for so much detail concerning the foundation of the Ruggaber Report. The prosecutor promotes a report based upon hearsay to foundation for a claim that the report shows all that DeLucia "could ever have received." The prosecutor ignores the cross examination (262) which we have quoted, where Agent Ruggaber admitted that he had no way of knowing how much, if any, money had been obtained by DeLucia.

We continue with the argument (G. 315):

Mr. Barnett: "There is not a scintilla of evidence that he ever received any more money out of the extortion than the $404,000 that we have given him, even though Mr. Stewart attempted to draw that inference from the cross-examination of Revenue Agent Ruggaber."

Here the prosecutor casts the burden on petitioner. There was nothing but hearsay to prove that petitioner had received any extortion money. There is not a scintilla of proper evidence to prove that DeLucia received $404,000. This is a strange way for the prosecutor to argue, his figure has no foundation, so he argues that in the absence of other proof his figure must be accepted. We continue further with the argument (G. 315):

Mr. Barnett: "Mr. Ruggaber said that on the evidence that he had available from that extortion trial, Mr. DeLucia received two-ninths of the total of $1,800,000 that was paid out in extortion funds, and that two-ninths came to $404,894.00. It has never been

admitted that Mr. DeLucia ever got that $404,894, un[less] Mr. Stewart in this court room attempted to get a[n] inference that he could have received more of the extortion money than we have given him credit for; there has never been a suggestion that he got any more. There has never been a suggestion that he got as much."

As Your Honors have perceived we did more than to "get an inference," we caused Agent Ruggaber to admit that he had no knowledge of how much or how little money was obtained. Your Honors will note that the prosecutor argues as if the law required DeLucia to explain his position about the extortion money. The prosecutor infers that an admission came too late from his trial lawyer during the trial. As Your Honors must know, from the record, the trial lawyer never admitted that DeLucia obtained any money by extortion. It is fundamental that a trial lawyer may assume the truth of various claims made by the witness or the prosecutor without being held to have made an admission binding as a matter of evidence upon his client.

We quote from the following said by the Court after verdict, to show that the District Court had been moved by the improper and prejudicial argument made by the prosecutor (667, 668):

By the Court: "The silence which the defendant chose to maintain throughout his trial was at his own peril. Not one word was uttered in mitigation of the offense. I anticipated that.

In the hope of winning an acquittal by creating a reasonable doubt, it was argued that the moneys expended by the defendant could have been procured by him in previous years from illegal extortion, gambling, business racketeering, et cetra.

True, the spurious theory might have raised a legal inference, but the jurors ignored it. After a guilty verdict such contention cannot mitigate but must aggravate the offenses.

It is the brand of criminality, brazenly advanced in open court, that has a tendency to demoralize our youth, corrupt our adults, and disgrace our nation as dissolute and lawless. It has irreparably menaced our general welfare, and is an alarming threat to our people.

Admittedly, the defendant has flagrantly violated the laws of his adopted country, since his entry under an alias. He was convicted and given the maximum sentence of ten years for extortion. After his release from prison, and while on parole, he defrauded the Government for three successive years."

We repeat from the above,

The Court: * * * "the silence which the defendant chose to maintain throughout his trial was at his own peril."

Your Honors said in the *Holland* case that this was a good rule, where the Government had first established a case. Not applicable here. But the prosecutor by casting the burden improperly on the defense no doubt made this case look like the *Holland* case to the Court. We again quote from the above.

The Court: "In the hope of winning an acquittal by creating a reasonable doubt, it was argued that the moneys expended by the defendant could have been procured by him in previous years from illegal extortion, gambling, business racketeering, et cetra.

True, that spurious theory might have raised a legal inference, but the jurors ignored it. After a guilty verdict, such contention cannot mitigate but must aggravate the offenses."

If the Court had not been carried away by the improper argument of the prosecutor how could His Honor designate this as a "spurious theory." The Government, by the Report of Agent Ruggaber, claimed to have proved receipts by extortion. By the Report of Agent Klein the Govern-

ment proved money obtained by gambling. Such was the case for the Government. The question arose as to the amount received, not where it came from. There was nothing else for the defense to argue. Could the defendant have claimed that the money did not come from illicit sources? We again quote from the above:

> The Court: "It is the brand of criminality, brazenly advanced in open court, that has a tendency to demoralize our youth, corrupt our adults, and disgrace our nation as dissolute and lawless. It has irreparably menaced our general welfare, and is an alarming threat to our people."

The Court had refused petitioner's instruction No. 211 (625) as follows:

> 211. No statement to any other transaction other than those contained in the indictment, upon which the defendants are being tried are to be considered by you as evidence of guilt in this case, and should be entirely disregarded by you in deliberation on the guilt or innocence of the defendants.

Apparently His Honor lost sight of the fact that petitioner was not on trial for other offenses. We again quote from the above:

> The Court: "Admittedly, the defendant has flagrantly violated the laws of his adopted country, since his entry under an alias. He was convicted and given the maximum sentence of ten years for extortion. After his release from prison, and while on parole, he defrauded the Government of taxes for three successive years."

As Your Honors know, petitioner had paid the penalty for having conspired to extort. The Court of Appeals when that Honorable Court reversed the judgment as to Counts I and II overlooked the fact that if the District Court had

had a proper conception as to the issues and what petitioner had been tried for, the sentence may have been different as to the whole case.

We now return to the opinion of the Court of Appeals in order to demonstrate that because of the confusion that Honorable Court failed to fully understand the record.

The Court of Appeals said, (herein p. 172):

> "If anybody is changing positions it is the defendant who has at times denied that he received the money and on other occasions claims by innuendo that this constituted the sum from which he made the various expenditures in the years in question."

Now perhaps with the above argument of the prosecutor in mind, Your Honors will learn just where in the record the Court of Appeals found an innuendo. The innuendo was drawn by the prosecutor from that said by Mr. Bernstein to Attorney King, from the questions asked by defense counsel and the argument of petitioner's trial lawyer. There is no other place in the record, as far as we can learn, for the Court of Appeals to have found anything about a claimed innuendo. The opinion is silent as to what was regarded by the Court of Appeals as an innuendo.

This casting of the burden on petitioner by the prosecutor was rendered more prejudicial by the following instructions (No. 55 and 56, p. 578) given at the request of the Government:

> 55. Where relevant leads are not forthcoming, the Government is not required to negate every conceivable source of non-taxable funds, and if the defendant, Paul DeLucia, failed to supply information to the agents in that regard or if you find that he supplied a false explanation, you may take such a failure or falsehood into account.

"Every conceivable source of non-taxable funds" was not involved. In his books DeLucia showed that some expenditures must have come from funds on hand. Whether leads were forthcoming or not as to "every conceivable source" the Government was obliged to show by evidence that the expenditures did not come from "funds on hand". DeLucia did supply the information in his returns, his books and his parole reports. So the Court was wrong in covering what might happen if DeLucia failed to supply information. DeLucia supplied no information proven to be false, so that portion of the instruction was prejudicial. The whole instruction (No. 55, p. 578) casts an improper burden on DeLucia to supply more information that that given.

During the investigation DeLucia had a perfect right to furnish nothing more than that which had been furnished. It was plain error to instruct the jury that the absence of leads should be taken into account. This is especially prejudicial in the light of the argument of the prosecutor along a similar line. We repeat one substance of the above instruction (No. 55):

> " • • • if the defendant, Paul DeLucia • • • supplied a false explanation, you may take such • • • falsehood into account."

This points up another instance in which the Court of Appeals erred. That Honorable Court held that the error as to Counts I and II left Count III free of error. The Court of Appeals overlooked the fact that the above instruction meant the following:

> • • • if the defendant, Paul DeLucia through either Mr. Bernstein or Mr. Bulger supplied false information etc.

Certainly such instruction was misleading as to Count III. It was perhaps a good instruction on the Government theory that petitioner was responsible for Messrs. Bern-

stein and Bulger. But when the Court of Appeals held that it was error to so charge DeLucia with that said by others that Honorable Court should have perceived that it had knocked the props out of the conviction under Count III.

> 56. In determining whether or not the calculation of the Government is reasonably accurate, you may consider whether the Government has run down all reasonable "leads" suggested to the agents, tending to establish his innocence, and has explored all explanations, if any, advanced by the defendant or his *representative* during the investigation. Obviously improbable explanations would not be entitled to as much weight as plausible and reasonable explanations. If you should find that the Government's investigation has failed to refute what seem to you plausible explanations, such failure may be considered by you in determining the validity of the *starting point*. If you are satisfied that all such reasonable leads and explanations have been exhausted or refuted this would be persuasive evidence which you could consider in determining whether the Government's calculation is reasonably accurate. (Italics added)

The vice of the above instruction is not only the fact that DeLucia was made responsible for that said by Mr. Bernstein "during the investigation". The above instruction assumes that DeLucia had made explanations during the investigation. In fact DeLucia made none.

The Government put into evidence the transcript of the conference of September 1, 1954 before Agent Smith (Exhibit No. 19, p. 406) which shows a letter addressed to petitioner from which we quote (406):

> "Investigation of your income tax liability for the years 1948, 1949 and 1950 is about to be concluded. It is the policy of this office prior to the completion of income tax investigations to afford the tax payers in-

volved an opportunity to incorporate in the record such explanations touching on the material matters as they deem advisable.

Pursuant to that policy, therefore, you are informed that such an opportunity is now available and it extends to you personally. The proceedings if any, will be recorded and counsel may be present."

DeLucia was notified that the Intelligence Division was considering criminal prosecution. DeLucia made no statement. The above argument of the prosecutor, together with the above erroneous instructions, surely gave the jury an improper understanding of the law applicable. The jury was told by the prosecutor and the Court that DeLucia was obliged to make explanations, as well as other misleading and inapplicable rules. These errors may help to explain to Your Honors the manner in which the Government was able to secure a conviction without sufficient evidence. Surely these errors influenced the jury as to Count III as well as to Counts I and II. The Court of Appeals understood that it was error to charge DeLucia with explanations made by his attorneys as to Counts I and II, but failed to perceive that the same errors should have resulted in reversal as to Count III. After Your Honors note the above misleading and prejudicial instructions permit us to repeat from the above quoted argument of the prosecutor:

Mr. Barnett: * * * "there is not a scintilla of evidence that he ever received any more money out of the extortion * * *"

Your Honors no doubt perceive from the record the unfairness of the whole procedure. First the prosecutor introduced the Ruggaber Report and the Government experts adopted a great reduction from the figures in that Report. Then because DeLucia did not show that he had received more than the arbitrary figure, the jury was requested to

believe that that figure had to be accepted. Instead of this, the District Court should have perceived that the Ruggaber Report was worthless as evidence and should have directed acquittal.

The Court in the above instruction referred to a *starting point* and left it to the jury to guess what evidence was supposed to create such a point. In fact there was none proved. The fact that there were no

> • • • "leads suggested to the Agents, tending to establish his innocence" • • •

could not possibly be properly considered by the jury in the determination of a non-existent starting point. The moment DeLucia was informed that the Agents were considering an indictment, he had a right to expect, in any forthcoming trial, to be presumed innocent. No duty existed to require him to furnish leads "tending to establish his innocence." The fact that that said by others, reasonable or unreasonable, true or false, was refuted could not possibly be considered as persuasive evidence that "the Government's calculation is reasonably accurate."

It is possible that if the Court had given the following instructions (No. 164, p. 609; No. 169, p. 612; No. 182, p. 615 and No. 197, p. 620) the harm of Nos. 55 and 56 may have been lessened.

> 164. If you find that the determination by the agents to be arbitrary and excessive, it may not be reasonably held that Paul DeLucia is bound to pay a tax he does not owe. There is no duty on Paul DeLucia to establish, by evidence other than his returns, the correct amount of taxes that lawfully might be charged against him. In other words, the burden never shifts to Paul DeLucia. Paul DeLucia is permitted by law through his lawyer to contest the findings and conclusions of the agents, without assuming the burden of proof.

169. DeLucia is not required to prove himself innocent by assuming the burden of overcoming any prejudicial effect of the mass of exhibits, estimates and conclusions which the Government has placed in the record, if put there upon any theory that it is up to the defendant to explain all of it away, as part of his burden to prove his innocence. There is no such burden.

197. The Fifth Amendment to the United States Constitution guarantees that no one need to be a witness against himself. This right is intended to protect the innocent as well as those guilty, because a person might avail himself of that right, it does not follow that he should be regarded as guilty. His action should not be used in a court at all and a jury would have no right to be prejudiced against any person who might claim such right.

The Court appears to have accepted the opinion of the prosecutor concerning just which instructions tendered by petitioner were justified and the Court would be warranted in giving (G. 305). The prosecutor no doubt realized that if any of the above refused instructions had been given the verdicts might be not guilty.

When we urged in the Court of Appeals that the case was fatally defective for lack of a starting point, that Honorable Court said: (herein p. 169)

> "As a result of this investigation the Government contended that DeLucia could not have had more than $48,697.01 at the beginning of 1948.
>
> The cash on hand at that date was the central issue in the case, *the defense position being that there was at least* $300,000 *on hand* and the Government's position that there was no more than $48,697.01. The jury resolved the issue against DeLucia and we can not say that in doing so, the verdict is not adequately supported by the evidence." (Italics added.)

After Your Honors understand this record it will be observed that surely the Court of Appeals would not have made the above finding except for a serious misapprehension. The chart, (Exhibit 181, p. 341) prepared by Agent Mahon showing $48,697.01 is based, for a starting point on the Report of Agent Ruggaber. That Report in turn is based upon hearsay. The figures concerning that received by DeLucia are based upon an arbitrary assumption.

So when the Court of Appeals said: (herein p. 169)

> "As a result of this investigation, the Government contended that DeLucia could not have had more than $48,697.01 at the beginning of 1948"

that Honorable Court overlooked the fact that this was a contention with no proper support in the evidence. If the jury ever resolved that the figure $48,697.01 was correct and that finding entered into the basis for the verdict, the verdict was not adequately supported by the evidence. We say "If the jury ever resolved." Nobody could say what the jury resolved, except to find guilt. The issue was not as stated by the Court of Appeals. The Court of Appeals has not stated all of the contention made by the Government. Of course the Judges of the Court of Appeals know that you cannot have a question for the jury, based upon the mere contention of the Government. That Honorable Court failed to perceive that there was no evidence but the unfounded opinion of the expert, *i.e.* that the $48,697.01 figure was correct. It may have been wrong to the extent of hundreds of thousands of dollars. Also, that Honorable Court has not understood "the *defense position*". We hope to make clear to Your Honors that the issue was not at all like that above stated by the Court of Appeals. Also when Agent Mahon (323) calculated the $48,697.01 and Agent Saldana adopted that figure, the experts assumed as a fact that DeLucia had paid taxes on extortion money

and had available only the computed figure, after Agent Ruggaber finished with adjusting the income received. In this respect (no starting point) the verdict was not supported by evidence. The Court of Appeals was also in errer in finding that *"the defense position"* was *"that there was $300,000"*. The defense position was that the plea of not guilty required the Government to prove its case. The law required that, as a vital part of the proof, a starting point must be established by evidence not by assumptions. The *"defense position"* *"that there* was at *least $300,000"* was taken by the prosecutor in argument from that said by Mr. Bernstein during the investigation. The Court of Appeals perceived that it was error to attribute to DeLucia that said in the investigation by Mr. Bernstein, yet that Honorable Court found that the *"defense position"* was based on that said by Mr. Bernstein. The *"defense position"* at the trial was that the Government had failed to prove its case. There may have been nothing about $300,000 in the evidence, if the Government had not put it in. If DeLucia had been on trial alone as to Counts I, II and III and the District Judge had understood the following three things, the District Court would not have permitted proof of the $300,000.

1. DeLucia was not to be charged with that said by Messrs. Bernstein and Bulger.
2. DeLucia never explained that the $300,000 came from extortion funds.
3. DeLucia made no explanation during the investigation and was not obliged to make one.

In such a trial the Judge would not permit the Government to prove that Mr. Bulger said he counted $300,000, merely to allow the prosecutor to claim that this was a false statement. The Government would have been re-

quired to put in a net worth case. Then if Mr. Bulger testified for DeLucia that the lawyer had counted $300,000, then and not until then would the door have been opened for the Government to prove the falsity of the testimony of Mr. Bulger. If one should say that in a joint trial this $300,000 counting business was admissible under Count IV only, Your Honors know by now that the evidence was used by the prosecutor and the lower courts against DeLucia.

Without the privilege of claiming falsity, the Government would not offer the self-serving testimony given by DeLucia to the Kefauver Committee, that he had $300,000 when he came out. Please bear in mind that DeLucia did not say he kept it in the attic. He did not mention Mr. Bulger in connection with the $300,000. He did not tell the Senators that the $300,000 came from extortion. He denied this. So it follows that if Your Honors took this case and reversed and remanded it, the case could be retried without the $300,000, if the evidence be properly limited to the issues under Count III. In such event, the "key to the entire case" would not be in the evidence, unless the Government wishes to put in a self-serving statement with no opportunity to claim its falsity. Of course Your Honors must know that the prosecutor would never put the testimony of DeLucia before the Kefauver Committee, that petitioner had $300,000 in evidence, if the prosecutor knew that the Court would not permit proof of statements out of Court made by DeLucia that petitioner had not received extortion money. When the record is understood, it will be seen that the Kefauver testimony is not contradicted by the out of court denials because before the Kefauver Committee DeLucia did not say that the $300,000 came from extortion. In his argument to the

jury, the prosecutor said, (547) after he asserted that the $300,000 was the key to the case:

> Mr. Barnett: "On the other hand, if that story is false, as we contend the evidence shows that it is, then Mr. De Lucia, *having explained that the source of the funds in 1948, 1949 and 1950 came from that $300,000,* then his explanation is false, the income must have been derived from taxable income, that is, the disbursements in 1948, 1949 and 1950 must have been derived from taxable income received by him during those years." (Italics added)

There was not a scintilla of evidence to show that DeLucia "*explained the source of the funds as coming from that* $300,000." We submit that the Court of Appeals should have been able to see this deficiency in the proof. Petitioner did not testify, nor did he put on any evidence. The $300,000 was brought into the case by the Government. The charge against Mr. Bulger and petitioner in Count IV was that they conspired to have Mr. Bulger tell a falsehood concerning the existence of a $300,000 hoard. The jury acquitted. Without a scintilla of evidence to support the conclusion, the Court of Appeals assumed that Mr. Bulger told a false story about the $300,000. The lower courts should have been able to perceive that there were more than two ways of looking at the evidence. The jury, if properly instructed could have found the story told by Mr. Bulger to be false and at the same time find that De Lucia had not been proven guilty by the net worth method as to Count III. This third way raises questions of materiality. The District Court improperly took that question from the jury.

We quote from the Court of Appeals (herein p. 165):

> "There is no showing that Bernstein was aware that Bugler would tell a false story, *as we assume he did.*" (Italics added.)

The charge against DeLucia in Counts I and II was that petitioner made and caused to be made a false statement about the $300,000. Petitioner made no statement at all to the Agents. The evidence failed to show that he caused any statement to be made to the Agents about the $300,000. The District Court found, without any evidence, that De Lucia had made a false statement about the $300,000 and further that petitioner had caused Mr. Bulger to falsify in this regard. The prosecutor prevailed upon the District Judge to hold that petitioner was responsible for that said by Mr. Bernstein concerning $300,000.

We again quote from the closing argument (G. 422):

> Mr. Barnett: Those deposit tickets are credited on the books to Mr. DeLucia's personal account, and who knows where they came from? Who knows? *The only explanation ever given* was that they were previously acquired funds—a ready answer. He has always got that ready answer. "Tell me what you think I have spent, and I will have enough in the attic to cover it. Previously acquired funds." (Italics added.)

If nobody knows where the money came from but DeLucia and he reported to the Parole Officials that the money came from "funds on hand," why not accept that report? "The *only explanation ever given*" is an argument to the effect that DeLucia was obliged to give an explanation. Here again the prosecutor refers to explanations given by Messrs. Bernstein and Bulger. DeLucia made no explanation. We repeat from the above:

> Mr. Barnett: "He (DeLucia) has always got that ready answer. Tell me what you think I have spent and I will have enough in the attic to cover it."

DeLucia never said any time, anywhere, that he had one cent in the attic. DeLucia never said anywhere anytime that if you tell him the expenditures he will have any answer. This argument is based upon that said by Mr. Bulger and possibly something said by Mr. Bernstein. The District Court held that statements by Messrs. Bulger and Bernstein were evidence against DeLucia. After the Court of Appeals perceived that the District Court was wrong on the law, that Honorable Court should have noticed the manner in which the prosecutor made use of the error committed by the District Court. The Court of Appeals failed to realize that that found by that Honorable Court as petitioner's defense was placed in the record by the Government. The defense of DeLucia was a demurrer to the evidence and his motion for acquittal. As we have said, at the request of the Government, the Court gave an instruction (No. 56, p. 578) concerning the exploration of explanations advanced by the defendant "or *his representatives.*"

The prosecutor in his argument referred to the conference of September 1, 1954 (Exhibit 19, p. 406), and referring to the lawyers, said (G. 344):

> Mr. Barnett: "We stand on our story as told to the Kefauver Committee." There were no leads offered at that time. They said, 'We stand on our $300,000. Upset it at your peril. * * *'"

We quote from the record in order to show what we did say about what we would stand upon (424):

> Mr. Smith: I say Mr. DeLucia has testified under oath before the Kefauver Committee, which is an un-

corroborated statement, as far as I am concerned. And I say that is one of the points we would like to clear up.

Mr. Stewart: Suppose we take the position that we stand on that statement? He made it under oath. Why ask him to repeat it. That's our statement and we stand on our books and records. We stand on the returns as made. If you don't choose to believe them, there is nothing we can do about that as of today. Why should we not be permitted to take that position?"

If the District Court had understood the law, as finally announced by the Court of Appeals, the prosecutor would not have been permitted to charge DeLucia with that said by the lawyers in a conference, even if the prosecutor had correctly represented it. There is a great deal of difference between that said by the prosecutor, *i.e.* "We stand on our story as told to the Kefauver Committee" and that actually stated to the Agents by the lawyers. We quote further from the argument (G. 344):

Mr. Barnett: Eugene Bernstein came in and presented a matter of defense. That was when Eugene Bernstein came in and said, "I have a schedule of funds available." That was when he said for the first time, Paul DeLucia had money in the amount of $404,894, not identifying it as extortion money, but, for the first time, claiming that perhaps Paul could have gotten that money. * * *

Here again Your Honors will perceive that the prosecutor improperly charged DeLucia with that said by Mr. Bernstein. Worse still, that so said was designated as petitioner's defense to the charge, as if DeLucia had made such defense at the trial.

The Court of Appeals said herein p. 164:

> "We have carefully read that transcript.* At no time did DeLucia make any statement, sworn or otherwise. Though there are several references to a $300,000 cache, which the Government claims is non-existent, such references can not be considered averments. Actually this meeting amounted to little more than verbal fencing between DeLucia's Attorneys and the Internal Revenue Agents."

The prosecutor confused the issue by claiming that under the law, the Government was entitled to a conviction under two alternative methods of proof. (a) because, among other things, the Government had proved a firm starting point and (b) an expenditures method. We quote from the argument, (551):

> "Mr. Barnett: I think it established a very tight starting point. I think it established an unimpeachable starting point." • • •

The prosecutor did not point to the evidence to establish his starting point. There was no such evidence. If the District Court, when we made our motion for acquittal had required the prosecutor to either point out his starting point or lose his case, some of the confusion might have been avoided. But as Your Honors shall see, the prosecutor claimed to have the benefit of two methods. The Court believed this to be a direct evidence case. (543) We quote further from the argument: (554).

> "Mr. Barnett: There is an alternative method of proof and that is, if you block out all non-taxable receipts, such as we have done in this case, then you, by

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* This is the transcript of the meeting of September 1, 1954 between DeLucia his attorneys and the Revenue Agents. This transcript was put into evidence by the Government and was read to the jury. It has been printed in full. (406)

that alternative method, show the unreported income or, rather, that the expenditures in that year must have been derived from an income producing source rather than from a non-taxable source, or, rather than from cash on hand in the beginning of the period."

We repeat from the above:

"• • • you block out all non-taxable receipts, such as we have done in this case • • •"

Any money received by DeLucia from extortion in 1934 to 1941 constituted non-taxable receipts for 1948, 1949 and 1950. The Government claimed that DeLucia had received about $227,000 in these non-taxable receipts. So the Government had made no effort to block out this $227,000. The Government did try to limit the non-taxable receipts to the $227,000 here, but that effort failed. So it is mere nonsense to say "such as we have done in this case." If the question involved had been properly submitted, it would have been,

What was the amount of non-taxable receipts recieved by DeLucia in the years 1934 to 1941?

This same nonsense was used by the prosecutor in order to deceive the District Court when it came to a discussion of the instructions. (543)

"Mr. Barnett: • • • Mr. Stewart has submitted a number of instructions, three or four, regarding the net worth theory. Your Honor mentioned you read the *Holland* case, which of course is the prime net worth case—

By the Court: *Holland, Freidberg,* and five or six of them.

Mr. Barnett: I wanted to say all the net worth originally ste[illegible]om what we call the expenditures,

and the case we have here is an expenditures case. As the result there is a little change in terminology necessary, and we have prepared our instructions accordingly."

So it will be observed from the record that if, on the motion for acquittal, the District Court had doubts about proof of a starting point, the Judge may have been misled by the prosecutor, because of his nonsense about two alternatives. By no means did the Government "block out all non-taxable receipts" or "cash on hand". The Court of Appeals said that this was a net worth case. Nothing was said about an alternative method. That Honorable Court failed to notice the harm done by the claim made of an alternative.

At the request of the Government, the Court gave instructions (Nos. 58, p. 579 and 54, p. 578) which authorized the jury to leave out the necessity of a starting point.

"58. The Government relies upon the cash expenditures method of determining correct net income in this case as to the tax evasion charges.

54. In deciding the question of whether the expenditures analysis as proposed by the Government properly reflects the receipt of taxable as opposed to nontaxable funds, you may consider the evidence, if any, of existence of a likely source of taxable income such as a trade or business. If you find such source, you may properly conclude that the net income as shown by the Government's expenditure analysis sprang from that source or sources and is taxable. If there is no satisfactory evidence to identify a likely source of taxable income, you may nonetheless consider *such evidence as they may be* tending to show that the net income determined on an expenditure basis *could not have come from any non-taxable sources,* such as gifts or inheritances, or *cash available from prior years* and

other such items as I have mentioned previously. And if you find that they did not come from non-taxable sources, you may properly conclude that they did come from an undisclosed taxable source." (Italics added.)

This instruction may have been applicable if the Government had "blocked out all non taxable receipts" but the Government had done no such thing. There is no evidence tending to show that the net income could not have come from cash available from prior years. There had been such cash. The Government expert said it amounted to about $227,000. The value of this opinion became the issue. A likely source of unreported income was required. The Government established a source of non-taxable funds on hand. The only real question was the amount. All this talk about gifts or inheritances could only confuse. To permit the prosecutor to escape from the requirements of the net worth method may have resulted first, in the denial of our motion to acquit, second, the verdicts of guilty, third in the judgment. The Court of Appeals has said nothing on the point. That Honorable Court said, (herein p. 170):

"With this as a starting point the Government went on to show that DeLucia had made large expenditures that far exceeded any reported income. * * * In addition to the proof of expenditures exceeding the reported income the Government also shows a possible likely source of this unreported income."

So Your Honors will observe that the Court of Appeals found a starting point and a likely source and overlooked the fact that the District Judge and the jury may have been deceived by the prosecutor to the extent of believing that all non-taxable receipts had been "blocked out" and consequently no starting point or source was required.

Referring to a check made of the Probate Court of Cook County by Agent Mahon for inheritances, the prosecutor said (G. 418):

> "Mr. Barnett: As far as I know, it is true his parents never came to this country, but his wife's parents did. There is no record of any estate leaving any money to them.
>
> Actually, that is one of those supercautious checks that was conducted by the Agents. They didn't actually have to go and check a record like that. I mean, they were not required to under the technical provisions of the law.
>
> For why? Because of this. *The only explanation that has ever been given* as to where those *moneys* came from that were expended in 1948, 1949 and '50 was that *there was* $300,000 *in a box, and Mr. Bernstein had submitted to Mr. Joseph B. King an analysis of funds available, where Mr. DeLucia got his money.*" (Italics added.)

The prosecutor here told the jury that the Government needed to do nothing but to show that the explanation was false. That this situation made it unnecessary for the Government to prove either a starting point or a likely source. Also that this explanation by Mr. Bernstein made it unnecessary for the Government to show by evidence that the expenditures in 1948, 1949 and 1950 came from non-taxable funds. Your Honors must know now from the record that the prosecutor had no evidence upon which to claim that DeLucia had made this explanation. In view of the fact that DeLucia had made no explanation and was not bound by that said by others, the prosecutor had no right to shift the burden of proof to petitioner. The Court refused instructions tendered by DeLucia and intended to embrace the theory of petitioner. (No. 157, p. 607; No. 165, p. 610; No. 166, p. 611; No. 167, p. 611; No. 168, p. 611;

No. 170, p. 612) The theory of petitioner was that under the circumstances of this case the Government was obliged to establish a starting point. The argument and instructions to the contrary were inapplicable, because vital elements of any alternative method were missing. In a net worth case, there must be both a starting point and a likely source. In the case at bar, the Government had neither. Instructions and argument on an alternative method only confused the real issue. The Court refused an instruction (No. 199, p. 621) tendered by DeLucia including:

> "If the testimony of Joseph Bulger about the three hundred thousand dollars was on a matter immaterial, an important element of this case is absent."

The Court of Appeals held that (herein p. 168):

> "As DeLucia's complaint concerning instructions relates solely to Counts I and II of the indictment what we have heretofore held dispenses with necessity for any comment thereon."

We trust that Your Honors will perceive that if it be error to confuse the jury with talk about an alternative method dispensing with starting point and source the error affected Count III. The Court at the request of the Government gave an instruction (No. 59, p. 579) from which we quote:

> "59. • • • You will see, therefore, that there are two types of charges here. You will note that Paul DeLucia is a defendant and is charged in all four of the counts, and that Joseph Imburgio Bulger is a defendant and is charged only in the fourth count. In the following instructions, both types of charges will be defined and covered and the law with respect to the charges given to you."

There were really three types; but when the Court said two, the jury no doubt understood one type to be conspiracy and the other income tax, lumping Counts I, II and III into one type. One instruction (No. 81, p. 584) refers to Count III specifically. We quote:

> "• • • which is identical to the section of the law referred to in the first two counts • • •"

If your Honors again examine No. 94, p. 586 above set out it will be observed that it deals with "the intent to evade" in all counts referred to in No. 90, p. 586, which mentions Counts I, II and III as concerning evasion.

We copy from our brief (p. 44) in the Court of Appeals.

XIII.

It was error for the District Judge to assume that the statements had been made. It was error for the District Judge to hold as a matter of law that the statements were material in the face of a possible finding that the facts contradicted both assumptions.

Sullivan v. *United States*, 178 F. 2nd 723, 725.

Although our main thrust was at Counts I and II, we did say* (Our brief p. 50):

> "Your Honors will observe that many of our points are interwoven. The error of the District Court in giving the above instruction can be understood only after all of the evidence has been studied."

We also said in our brief (p. 48).

As said in *Blackman* v. *United States*, 68 F. 2nd 572, 573:

> "The materiality required is not as to any particular issue in the case, but as to the trial as a whole, that is,

*The petition for rehearing and the briefs of counsel have been included in the record certified as a part of this record.

materiality is determined by whether the false testimony was capable of influencing the tribunal on the issue before it," (citing cases.)

Because of the claim made by the prosecutor that that instruction was intended for guidance only as to Count IV, we respectfully request Your Honors to examine the charge as a whole. There will be found the following (592):

> 113. When men enter into an agreement for an unlawful purpose they become agents for one another and have made a partnership in crime. The act of any one of such parties in furtherance of their common purpose must be considered to be the act of all and all are equally charged with it.

The District Judge may have very well considered the above instruction as applicable to the conspiracy count alone. The question is not what the District Judge or the prosecutor may have understood. What did the jury understand?

> "We respectfully request your Honors to keep the above principle in mind as Your Honors consider our claim of error concerning the refusal of the District Court to allow inspection of the report made by Agent Smith. We have pointed out to Your Honors that DeLucia made no false statements. The instruction assumes that DeLucia made statements when he had made no statements."

The instruction (No. 102, p. 588) is as follows:

> "102. The fourth count of the indictment charges that the defendants, Paul DeLucia and Joseph I. Bulger, conspired to commit an offense against the United States, to wit, to knowingly and wilfully make false statements and representations in a matter within the jurisdiction of the United States Treasury Depart-

ment, Internal Revenue Service, in violation of Sections 2 and 1001 of Title 18, United States Code. You have heard testimony that representations were made on September 1, 1954 before certain officials of the Internal Revenue Service and, further, that the defendant, Bulger, in the company of the defendant, DeLucia's attorney made certain statements concerning the counting of $300,000 before Assistant Regional Counsel Joseph B. King of the Internal Revenue Service. It is for you to determine from all the evidence in the case whether these statements and representations were true or false.

"With respect to whether or not these statements and representations were material or were made in a matter within the jurisdiction of an agency of the United States Government, that is a question for the Court to determine as a matter of law. I have determined that such statements and representations as were made to representatives of the Internal Revenue Service were made in a matter within the jurisdiction of a department and agency of the United States and, further that such statements and representations were material to a matter then under consideration by the Internal Revenue Service. You need not and should not concern yourselves to any further degree with this matter of law. It remains, therefore, for you, ladies and gentlemen of the jury, to concern yourselves solely with the question of whether such statements and representations as were made to the officials of the Internal Revenue Service were true or false and whether the defendants, DeLucia and Bulger, conspired together for the purpose of making statements and representations which they knew to be false."

If Your Honors should look at the indictment and the verdicts, without looking further at the record, it might be thought that the various Counts involved separate charges. But if the entire record be consulted it will be

seen that the manner in which the case was presented and argued by the prosecutor, and the manner in which the jury was instructed, an issue was made as to the $300,000. The prosecutor said it was the key to the entire case (547). The issue as to the statements made during the investigation may be broken into the following parts. We follow the language of the above instruction:

(a) Were representations made on September, 1954 before certain Revenue Officials?

(b) Did Mr. Bulger make statements concerning $300,000?

(c) Whether these statements were true or false.

(d) Whether these statements and representations were material?

(e) Whether these statements were made in a matter with the jurisdiction of the Revenue Service.

The Court assumed in (a) that statements and representations were made. The Court of Appeals held that there was a total failure of proof that DeLucia made or caused to make (a). When your Honors notice that the prosecutor built his man of straw by saying to the jury over and over again that DeLucia had made (a) the prejudice of the instruction as to the whole case should be obvious.

The Court assumed that (b) was made. The Court of Appeals held that this was hearsay as to Counts I and II. After Your Honors note, from the record, the manner in which the prosecutor used (b) against DeLucia as to all of the Counts, the prejudice created by the instruction as to Count III must also be obvious.

The Court left to the jury the question (c). Your Honors must know that if (a) was not a statement made or caused by DeLucia, the jury should never reach the question of whether that said by the lawyers was true or false.

The Court took (d) from the jury. This was clearly error, not only as to Count IV, Counts I and II, but as to Count III. In the prosecution under Count III if the Government proved no starting point and the figures submitted by the experts were worthless, it would not matter what statements had been made, or whether they were true or false. The statements could be material only if the Government had proved a case, or if the statements contributed to the proof of the charge. If the statements were true, the proof failed. So the statements wouldn't be material, as far as the prosecution is concerned, unless they were false. The prosecutor staked his entire case on the question as to whether they were false. The Judge instructed that the statements were material, true or false. This assumption was no doubt confusing as to all counts.

The Court took (e) from the jury. The Revenue Service would have had no jurisdiction in the absence of an attempt to evade taxes. A lawyer might understand that the Revenue Service had the power to investigate an innocent taxpayer, but the problem presented, is—what did the jury understand,—especially in view of the argument of the prosecutor and the instructions. No doubt the jury believed that the statements had been made in official hearings and they bore the same significance as if they had been made by DeLucia as his defense in the trial. The prosecutor certainly took that position in argument. This instruction also, together with others given, fortified the

claim of the prosecutor that the burden shifted to DeLucia and that petitioner was obliged to make a statement in the investigation in order to furnish the Agents with leads. As we pointed out to the District Court (658) the error of giving this instruction (No. 102, p. 588) affected the entire case and gave reasons for the existence of error committed by the refusal of the Court to allow us to inspect the statements including the Report signed by Agent Smith. We quote (658 to 660):

Mr. Stewart: "With all due respect, your Honor by this instruction took from the jury the following contested issues:

(a) Whether any statement at all was made by DeLucia to the Revenue Service.

(1) On September 1, 1954 DeLucia kept his mouth shut. His lawyers made no statement of fact, they merely sought information.

(2) On November 19, 1957 DeLucia was not present. There is no legal evidence in the record that DeLucia had anything to do with that said by Joe Bulger. There is evidence that Joe Bulger told the Grand Jury that DeLucia asked him to appear and testify before the Revenue Service, but that was hearsay as to DeLucia.

(b) The indictment alleges that the statements were not only false, but were material and within the jurisdiction of the Revenue Service. Your Honor decided such questions and deprived DeLucia of a jury trial on these two vital elements.

Now we respectfully ask—how did your Honor arrive at such conclusions? Did your Honor examine the report made by Agent Smith and others to determine what action, if any, was taken by the Revenue Service on the statements. If so, your Honor made use of evidence not available to DeLucia.

(1) What may have been material is a mixed question of fact and law.

Your Honor had no right to take this issue from the jury.

(2) The materiality or lack thereof of the statements would depend upon what influence, if any, the statements had on the Service. The jury could know nothing of this without the report denied to us.

(3) Even if Your Honor had a right (which we do not concede) to decide this question of materiality as a matter of law—DeLucia had a right to also examine the evidence upon which Your Honor based this conclusion. We have been denied a hearing on this subject. The contents of the report denied us can not be buried in a sealed envelope, it must have been used. If your Honor did not use the report, then your Honor ignored important evidence. Now if your Honor will again examine *Jencks* v. *United States,* 353 U.S. 657, it will be seen that we were entitled to have the report made by Revenue Agent Smith. In fact the Government should have put the report into evidence as a part of its case in order to show the materiality, or lack thereof, of the statements. Your Honor relieved the Government inadvertently by assuming the burden and deciding for the Government as a matter of law. See *Bergman* v. *United States,* 253 F. 2d 933."

In February 1956, Agent Smith (298) called at the home of DeLucia and asked him how much money he had paid as attorneys fees in the extortion trial. DeLucia stated that he had paid $25,000 into a common defense fund. That is all the prosecutor asked about on direct examination. The prosecutor had not yet offered into evidence the transcript (406) of the conference where the witness Agent Smith had presided as Group Supervisor. We quote (299):

By Mr. Stewart: Your Honor, I would like to cross examine Mr. Smith. The record will show that he was one of the agents present on September 1, 1954. As a matter of fact, he was in charge when an interview was had in his office and the Government has al-

leged that that interview was one of the overt acts. Now, I want to obtain the view of your Honor as to whether or not that would be cross examination now, or at such time as the Government puts in that overt act.

By the Court: I am not familiar with what you mean by an "overt act."

(To Mr. Barnett): I assume you are going to put in the entire case?

Mr. Barnett: We are going to put in the entire case.

By the Court: Then you may reserve your cross examination.

By Mr. Stewart: I think I prefer to do that. * * *

Mr. Barnett: (300) As I see it right now, I have finished my direct examination. There is nothing about the overt act, as yet. If there is nothing about the overt act, this witness, at this point, would be beyond the scope, on that particular point.

Mr. Stewart: That is the reason I spoke to your Honor about it. I recognize that rule of law and I would rather cross examine him at the time when we have before the Court and the jury the transcript of what was said in his presence.

By the Court: Let us go into my chambers, and I will discuss it with you.

After a discussion of the meaning of overt act, it appeared that the prosecutor intended to offer later in the case, the transcript (406) to prove one of the overt acts. The conference of September 1, 1954 (406) is also alleged in Counts I and II in reference to false statements. Then counsel requested inspection of the report made by Agent Smith relative to the meeting shown in the transcript (406):

By Mr. Barnett: "I will turn over to the defendants the report that Mr. Smith rendered to the events to which he testified.

Mr. Stewart: I think it ought to be broader than that, in order to save time, your Honor. He is a witness to the overt act, and we would like to have them in advance so that we can be familiar with them. The law entitles us to that, your Honor. You will remember in the *Jencks* case, the Supreme Court said that it is the duty of the prosecutor to do justice—

By the Court: Once he takes the stand, I think they are entitled not only to what he testified to, but anything that might have a tendency to impeach him, and any other statement, I think they would be entitled to it.

Mr. Barnett: As I understand, the motion is made under the Jencks law, they are entitled to a statement, any written statement of the witness, touching upon the matters to which he has testified.

The Court: It doesn't say that.

Mr. Barnett: I am talking about Section 3500 of this Code, which is a codification of the *Jencks* case.

The Court: Not just what he testified to, but any witness who once submits himself to the processes of the court, the defense becomes entitled to a complete statement.

Mr. Barnett: The complete statement, yes, your Honor, but not every report that the man has ever written.

The Court: No. But I mean about this case—read the section. * * * (306) He has a right to look at it. If it has nothing to do with it, they have no right to look at it.

Mr. Stewart: The *Jencks* case goes still further. It is the job of the defense counsel to determine what has value or does not have value, and it is not the job of the judge or the prosecutor, and we must see the statement before we can make up our mind what part we want to use. * * *

Mr. Barnett: May I correct something Mr. Stewart has said? He says by rights the defendants have a right to go through our files and determine what they can use.

The Court: I disagree with that.

Mr. Barnett: That is the reason Section 3500 was put on our books.

The Court: I think I have discretionary power to determine which part of the statement they are entitled to see to help them present their defense properly and legally. Nothing that has no reference or bearing upon the issues.

The District Judge then examined the report during recess and after further argument held that it could be of no value to petitioner and refused to permit counsel for the defense to see the report. We quote from the record (434):

Mr. Stewart: "May we have all of the documents that Mr. Barnett identified in your chambers?

The Court: No; just the last letter.*

The others cannot have any possible bearing and are strictly speculative, office communications, not about this matter but about every phase of the case and have no bearing on the situation.

Mr. Stewart: May I say this, Judge, with all due respect, I believe Your Honor is making a mistake in deciding whether they are of any value to us and I wanted the record to show our objection. * * *

The Court: I said I would like to preserve your record for you and all the others, too, to the Court's absolute satisfaction that it may be reviewed. * * *

Mr. Stewart: Right in that connection, I think it might be well for me to say, for the purpose of the record, that our position should be just a little bit stronger now since more testimony has developed. I

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*This letter dated February 28, 1956 has been copied into the record. (314) It refers only to the conversation had between Agent Smith and DeLucia in 1956 relative to Attorney fees in the extortion trial. The defense also received a memorandum, dated March 13, 1957, from Agent Smith to Agent Mahon about the same conversation with DeLucia. This memorandum is also printed in the record. (438)

mean, it is stronger than it was when we were in chambers because there is still an additional reason why we should have that report.

The playlet* that we put on here this morning with reference to what happened up in the conference where Mr. Smith was present and Mr. Stonesifer and Mr. Scholz representing the Government,—Your Honor could see from that that we were told that the purpose of calling us in was so that they could complete their investigation and make their report. * * *

If we can show by their report and the surrounding circumstances that there was no chance to influence the action because the action was based upon what they investigated and what they found—you see, there are a great deal many more things involved here than just a question of trying to impeach a witness. We are trying to get at the facts.

Now if it is a fact that this case was closed out and recommended not for prosecution, that is a fact which I think we are entitled to, and we shouldn't be left just fishing for it."

As we have said, Agent Smith was called as a witness before the prosecutor offered the transcript (406). Not having seen the report denied to us we can not say, but Your Honors might know now from the Report whether Agent Stonesifer joined in the Report or refused to join. If the Report does not show the fact this would have been proper cross examination of Agent Stonesifer who identified the transcript (Exhibit 198, p. 406) for the prosecutor in order that it be put in evidence (393). During the discussion, referring to the Report we said (436):

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*The transcript (406) had been read to the jury. The lawyers took the part of the speakers and followed the transcript as a script.

Mr. Stewart: "Now if it is a fact that this case was closed out and recommended not for prosecution; that is a fact which I think we are entitled to, and we shouldn't be left just fishing for it. I could ask Mr. Stonesifer, but supposing he tells me there was no decision made then I am hopelessly at his mercy. I should have what is in the file."

We again quote from the record (390):

By Mr. Stewart: Judge, we want to obtain any statements that this witness Stonesifer has made.

By the Court: Please don't discuss the case with anyone, even with the lawyers, Mr. Witness.

Mr. Stewart: We would like any reports that you have of this witness under the *Jencks* case. This is a new witness to the case, your Honor.

The Court: I am going to read it tomorrow morning. I will get down a little earlier.

Mr. Stewart: That is this witness.

The Court: The report of his statements?

Mr. Stewart: Yes.

The Court: When he finished, I suppose I will read the statement and I will hear you in Chambers on the law, and it will be a matter of policy in all similar situations, I believe.

I think we ought to reach a policy on the law, so we will not be groping in the dark on it. I will make my statement on the record clearly, as clearly as I can make it.

Then we will apply it to this witness and all the witnesses in the same situation.

Mr. Stewart: Very well, sir.

The Court: I think you are better off, Mr. Stewart, waiting until he finishes so that I can determine if they have any statements, what applies to the law, as I see it.

Mr. Stewart: Yes, sir.

Then on the next day of the trial the following took place: (432)

By The Court: All right Mr. Barnett, and gentlemen: I have read all of the documents rather thoroughly in re witness Thomas N. Smith, which were discussed briefly and superficially with lawyers in my chambers.

I find that none of these documents, with the exception of the last one, can possibly have any bearing on the witnesses testimony, or have any probative value of any kind, particularly in this situation, so, I am going to identify these according to the regular procedure and have them marked. The Government is authorized not to dispose of them, whatever the order is, but, on the last one, that document, I would prefer that Mr. Stewart take a look at it and if he wants it, I would order the Government to let him look at it, because it has a bearing on his witness.

Mr. Stewart: I want it. I want anything I can get.

The Court: Yes, I say, perhaps you don't. I don't know what the value is.

Mr. Stewart: If I get it and if I don't want to use it, that is another matter.

The Court: That will be the order.

During one of the discussions in chambers, Mr. Barnett identified the papers refused by the Court and sealed them up for delivery to the Court of Appeals. They have been sent to this Honorable Court. We have never seen them.

The Court of Appeals said, (herein p. 167):

"DeLucia also objects to the refusal of the trial court to direct the submission to him of certain memoranda in the possession of the Government. The Court reviewed the memoranda *in camera* and correctly decided only one had any relation to the testimony of Agent Smith, the author of the memoranda. This one was turned over to the defendants. It is now contended

that such refusal was in violation of the mandate laid down in *Jencks* v. *United States*, 353 U.S. 657.

The District Court was however, following the provisions of 18 U.S.C.A. § 3500 and as we said in *United States* v. *Spanglet*, 2 Cir., ... F.2nd, ..., (quoting)

"We agree with the Second Circuit and hold that De Lucia's contention that 18 U.S.C.A. § 3500 is unconstitutional is without merit."

Considering the fact that we have never seen the papers denied us by the District Court we are not in any position to argue from their contents that they would have been of value. In *Jencks v. United States*, 353 U.S. 657, 669, Your Honors disapproved of the practice of producing government documents to the trial judge for his determination of relevancy and materiality. We have quoted enough from that said by the District Court to show that if Judge Miner had had only the *Jencks* case as a guide, the Court would have turned the papers over to us. After further argument, the prosecutor convinced the Court that § 3500 has changed the practice. The questions squarely presented by this record may be stated as follows:

(1) If § 3500 had not been enacted would it have been error for the Court to refuse to require delivery of the papers on the ground stated, *i.e.*, that they could have been no value to the defense?

(2) If the answer to (1) is yes, the question arises, was it error to refuse, after application of § 3500?

(3) If it would have been error under the *Jencks* case and not error under § 3500, has Congress the Constitutional power to change the practice, in the light of the *Jencks* case?

(4) In view of the fact that the Government was obliged to prove the materiality of certain statements and the Court took this question from the jury by instruc-

tion after an inspection *in camera* does not this amount to conviction on evidence not heard or seen by petitioner?

When your Honors consider (1) above we call attention to the language of § 3500 from which we quote:

> "• • • the court shall excise the portions of such statement which do not relate to the subject matter of the witness • • •"

This raises the question of what constitutes the "subject matter of the testimony of the witness." Here both witnesses (Stonesifer and Smith.) The prosecutor thought he would play it cute and keep the report from us by controlling the subject matter and limiting the subject to one conversation with DeLucia. The prosecutor put himself in the position of Shylock who did not realize that his contract had not included the blood. If your Honors take a narrow view and agree with the prosecutor, "the subject-matter" asked by Agent Smith was one conversation. But even with a narrow view that one conversation was put in evidence with the intent that the entire subject matter would be helpful from the standpoint of the Government. The direct examination of Agent Stonesifer opened up the entire case for the cross-examination.

Your Honors will note that in the transcript Agent Smith has discussed figures including $300,000. Agent Smith fixed a starting point based upon a misconception of the Report of Agent Klein. The Report made by him must have either contained this misconception or showed a discovery of the mistake. We are in the dark, unable to argue on any appeal as to the value of the Report. At the trial level after the verdicts, we requested that the report be spread of record but that was refused. The whole business results from an attempt on the part of Congress to meddle with court procedure contrary to the spirit of our laws as expressed by your Honors.

The answer to the problem appears to be in the answer to this question—

> Were we entitled to cross examine Agent Smith about the conference?

If we were entitled to cross examine him on this subject we were entitled to the Report. The District Court ruled that we could cross examine him only on the subject of his direct examination. We were refused the report as of no value on such narrow view of our right to cross examination. Suppose Your Honors decide to adopt the broader view. The prosecutor had placed the transcript (406) into evidence before the District Court decided to refuse. After the transcript was in evidence, clearly the "subject matter" was not limited to the one conversation. Your Honors have noticed that Agent Smith was quoted as having said many things about the situation in the transcript. When Agent Stonesifer took the stand we confronted him with some of the things mentioned in the transcript. We were handicapped in not having the Report now in question at that time. If the prosecutor had not called Agent Smith to the stand at all a different question may have been presented. If the Report had been delivered to us, we might have recalled Stonsifer for further cross. You Honors will keep in mind that the transcript (406) contained material wrongfully used by the prosecutor as evidence against DeLucia. Under the circumstances, the District Court should have permitted the defense more latitude in the cross examination of Agent Smith. The Court of Appeals was able to perceive from the record that (herein p. 164)

> "Actually this meeting amounted to little more than verbal fencing between DeLucia's attorneys and the Internal Revenue agents."

Perhaps if we had been allowed a little more latitude and had had the Report, we would have been able to demonstrate to the jury that this meeting was a mere verbal fencing match. In this connection, we trust that Your Honors will study all that was said by Agent Smith at the conference (406). Keep in mind that the prosecutor by introducing this transcript had the advantage of that said by Agent Smith, without any disadvantage to be brought about by cross examination. We quote (412):

> Agent Smith: "We are not the prosecuting agency in this. We are merely a fact finding agency and if our facts are such, after discussing the matters with your client, if he so desires to discuss it with us, if our findings are such that we see fit to recommend prosecution, or we see fit not to recommend prosecution, that will be based on what we find out from your client."

This alone should link the transcript with the Report.

The lower courts have overruled our contention that the verdicts can not be reconciled. We quoted from the dissenting opinion in *Dunn* v. *United States*, 284 U.S. 390, 406 regarding this quotation to be a good statement of the general rule. Although we informed the Court of Appeals that our quote was from the dissenting opinion by Mr. Justice Butler, the Court of Appeals treated our brief as if we had quoted the dissent as opposed to the majority opinion. Both opinions can be correct as to general rules. As Your Honors know, the decision in any particular case depends upon the evidence and the nature of the charge in separate counts. We again quote the general rule from the dissenting opinion of Mr. Justice Butler in *Dunn* v. *United States*, 284 U.S. 390, 406:

> "I am of opinion that the authorities establish as well settled: (1) that when upon an indictment charging the same offense in different counts, the jury ac-

quits as to one and convicts on the other, defendant is entitled to a new trial; and (2) that when different crimes are charged in separate counts and the jury acquits as to one and convicts on the other, the conviction will be sustained unless, excluding the facts which the jury in reaching its verdict of acquittal necessarily found not proved, it must be held as a matter of law that there is not sufficient evidence to warrant a verdict of guilty; and, where the evidence outside the facts so conclusively negatived by the acquittal on one count is not sufficient to sustain guilt on the other count, defendant is entitled to a new trial."

(1) This is not an indictment charging the same offense in different counts as to III and IV. III is an income tax case; IV is conspiracy.

(2). As to the different crimes (a) excluding the fact the jury found necessary to prove in Count IV, *i.e.*, falsity of $300,000, there is not enough evidence to find guilty as to III. (b) the evidence of the facts negatived by the acquittal is not sufficient to sustain guilt on Counts I, II and III. As to (a) and (b) we contend that there is not enough evidence to convict in III if III were tried alone and all the evidence admissible under IV and not proper under III were eliminated. The Government put its eggs in the basket as to all counts on proof of falsity as to the $300,000. If DeLucia had $300,000 when he came out, the charts can be thrown overboard.

As to (a), the prosecutor built his case on III by pretending that the defense of DeLucia was that the $300,000 was derived from extortion and was used to cover expenditures. By finding DeLucia guilty on III, the jury agreed with the charts, *i.e.*, DeLucia could not have had $300,000, so the defense was based on falsehood. In acquitting on IV, the jury found that it was not satisfied that the $300,000

was false. The Court took the question of materiality from the jury. So therefore the verdicts on III and IV contradict each other.* The Court of Appeals said, (herein p. 172):

> "As we are now concerned only with Count III what had been said is completely dispositive of any vestige of inconsistency."

This no doubt means that there may have been an inconsistency between the guilty on Counts I and II and the not guilty on Count IV. All three counts are based on the same charge as to the making of false statements. So the Court of Appeals has inferred that if there be any inconsistency here, the error of judgment is harmless because the Court of Appeals has reversed as to Counts I and II on other grounds. This attitude overlooks our argument that the inconsistent verdicts were the result of confusion created by the prosecutor. The errors cumulate. It may be possible that if left alone with Count III in a case free from the error already found to exist by the Court of Appeals as to Count I and II, the jury would have acquitted as to Count III. The record may be compared to a human body with cancer in an advanced state. The jury and the District Court were unable to diagnose it as a cancer affliction. The Court of Appeals found the cancer, removed it, and we are expected to believe that the patient has been cured and will live.

On the second day of deliberation both sides tendered an instruction to the jury. Your Honors in *Allen v. United States*, 164 U.S. 492 have approved of the practice of in-

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*The Court of Appeals has stated that counsel made a concession in oral argument. We contend that this was the result of a misunderstanding. Cf our petition for rehearing.

structing a jury after retirement. In view of the fact that DeLucia submitted forms of instruction (No. 219, p. 639 and No. 220, p. 640), petitioner is in no position to complain of the action of the Court in giving some kind of an instruction. The objection made in the District Court was to some of the language embodied in the instruction tendered and as finally given by the District Court. The Court of Appeals said, (herein p. 172):

> "The supplemental instruction as thereafter given by the Court has been approved by this Court almost in *haec verba*, *United States* v. *Kutling*, 7 Cir., 1952, 194 F. 2d 1.
>
> We therefore, hold that the Court did not err in giving the supplemental instruction."

The supplemental instruction as finally given (637 to 639) is as follows:

> By The Court: "Before I discuss anything with you, I would like to give you one more instruction, if I may. The manner provided by our Constitution and laws for deciding questions of fact in cases as this is by a verdict of a jury. In a large proportion of cases, absolute certainty cannot be attained or expected. Although the verdict to which a juror agrees must, of course be his own verdict—the result of his own convictions and not a mere acquiescence in the conclusion of his fellows, yet, in order to bring twelve minds to a unanimous result, you must examine the questions submitted to you with candor, and with a proper regard and deference to the opinions of each other. You should consider that the case must at some time be decided; that you are selected in the same manner, and from the same source, from which any future jury must come; and there is no reason to suppose, twelve men and women more intelligent, more impartial, or more competent to decide it.
>
> Am I reading it clearly?

With this in view, it is your duty to decide the case, if you can conscientiously do so. In order to make a decision more practicable, the law imposes the burden of proof on one party or the other, in all cases. In the present case, the burden of proof—the burden is upon the Government to establish the guilt of the defendants beyond a reasonable doubt, and if you are left in doubt as to the guilt of the defendants, or either of them such defendant or defendants, is entitled to the benefit of that doubt and must be acquitted. But, in conferring together you ought to pay proper respect to each other's opinions and reasons, with the disposition to be convinced with each other's argument. And, on the one hand, if much the larger number of you are for a conviction the dissenting jurors should consider whether the doubt in their own minds is a reasonable one which makes no impression upon the minds of so many men and women equally honest, and equally intelligent, and who have heard the same evidence, with the same attention, with an equal desire to arrive at the truth, and under the sanction of the same oath. And, on the other hand, if the majority of you are for acquittal the minority should equally ask themselves whether they may not reasonably and ought to doubt the correctness of the judgment which is not concurred in by a number of those with whom they are associated and distrust the weight or sufficiency of that evidence which fails to carry conviction in the minds of their fellows.

You will again retire to the jury room and continue your deliberations. Now, I am told that you have a question to ask. If, after some more deliberations, in the light of this instruction, you still want to ask the question, I would appreciate it if you would put it in writing and knock on the door again and I will be very happy to consider it.

Thank you very much."

Our objections were detailed and argued in Chambers before the instruction was given (632).

It is true that much of the language used by the District Court was copied by the prosecutor from the *Allen* opinion. The objections we now make were not made, insofar as is shown. Our respectful request is that your Honors consider the language of the instruction in the light of our objections. We submit that the nature of the evidence and the manner of its presentation was such that an argumentative instruction at this point should reverse.

> Mr. Stewart: "In a large portion of cases, absolute certainty cannot be attained or expected." I don't think that expression is necessary at this time because your Honor has already instructed the jury on reasonable doubt and that, as I see it, seems to sort of minimize that and it takes some things away that the defendants are entitled to.
>
> Now, that is one of the objections. I am going to read again from the instruction. "* * * You should consider that the case must at some time be decided; that you are selected in the same manner, and from the same source, from which any future jury must come; and there is no reason to suppose that the case will ever be submitted to twelve persons, twelve men and women more intelligent, more impartial, or more competent to decide it."
>
> Now, I have several objections to that. The jury has nothing to do with the fact that the case must, at some time, be decided. As a matter of fact, there are some cases that are so uncertain and the minds can't meet and there are cases that result in a disagreement which results afterwards in a dismissal of the case by the prosecution. If this is such a case, the jury has nothing to do with that now.
>
> Then, to say 'You are selected in the same manner, and from the same source,' that may not be true. This was a special panel. We may later on get another panel. Suppose in this case, Your Honor, we had been making objections to the source and we had a point

that we made with reference to the fact that his source, the way the Clerk goes at it, with the Jury Commissioner, doesn't get a proper cross-section of the community. This jury may be the kind we have a valid objection to. It has nothing to do with the purpose of the instruction I am going to read again from the instruction":

"and there is no reason to suppose that the case will ever be submitted to twelve persons, twelve men and women more intelligent, more impartial, or more competent to decide it."

That may be true. * * * It is no business of the Court to say that there will never be twelve persons, twelve men and women more intelligent, more impartial or more competent to decide it. There may be something we discover later that we want to raise. It may be that something happened to make someone not impartial. It is not necessary to put that in the instruction.

I will go ahead:

"With this in view, it is your duty to decide the case —"

By the Court: And that is the answer, "if you can conscientiously do so."

Mr. Stewart: That is right, but you don't need the other part. I assume your Honor is going to take this the way it is. I want to make a record.

"In order to make a decision more practicable, the law imposes the burden of proof on one party or the other, in all cases."

Now, it can't be one party or the other, in another case. Why talk about another case where the burden may be on the other side? Your Honor has already instructed the jury as to the burden of proof. * * * (635)

635 * * * and then follows the language:

"And on the one hand, if much the larger number of you are for a conviction the dissenting jurors should consider whether the doubt in their own minds is a reasonable one which makes no impression upon the

minds of so many men and women equally honest, and equally intelligent, and who have heard the same evidence, with the same attention, with an equal desire to arrive at the truth.

There, of course, that follows the *Allen* case, but, I will say it may be possible somebody on there may be moved by prejudice and doesn't have an equal desire to arrive at the truth.

"and under the sanction of the same oath. And, on the other hand, if the majority of you are for acquittal the minority should equally ask themselves whether they may not reasonably and ought to doubt the correctness of the judgment which is not concurred in by a number of those with whom they are associated and distrust the weight of sufficiency of that evidence which fails to carry conviction in the minds of their fellows."

If I remember, in the *Allen* case, they don't talk about distrust of evidence. That is another element that is being put in here, where Your Honor is telling them at this late date that there is certain evidence which should be distrusted. You have no way of knowing what the jury might trust or distrust in these deliberations. We get to talking about a lot of things, beyond the scope of the case."

CONCLUSION.

In conclusion we repeat the argument made on behalf of petitioner in support of a motion for new trial. (664 to 666). The argument failed to accomplish its purpose but we repeat in the hope that your Honors will perceive that the principles mentioned should have been given heed.

It must be obvious that this case is an example of persecution. Mr. Barnett, as fair as he would wish to be, is more or less helpless. The orders come from Washington, as was said to the Revenue Agents on September 1, 1954. Mr. Barnett must prosecute, as best he can, regardless of the facts. He must do this or resign. Your Honor, must be drawn into the net which encompasses the prosecution, or your Honor must now assert the independence of the

judiciary vital to our Government. We appreciate that it takes considerable personal courage to render a decision opposed to ideas generated by prejudice. We must rely upon that courage in Your Honor. Without such courage our Government fails. The easy way is to send us to the Court of Appeals. We arrive there with the approval of the verdicts by Your Honor. Of course Your Honor should not approve of these verdicts unless after consulting the conscience of Your Honor you really believe that the verdict is in accordance with the law and is supported by the evidence. Equality before the law is engraved over the temple of the Supreme Court. If we are unable to secure equality before the Trial Judge because the Trial Judge may wait for the higher courts to enforce our rights, this Government of ours is in desperate straits. There is no reason we know of to prevent us from clinging to the hope that the Trial Judge will be just as careful as the Supreme Court to protect the citizen from persecution by the powers of officials.

We request your Honor to hold that the Government had no case, which the officials must surely know. It remains to be seen if this be a Government of men or of laws.

Your Honor should have thrown the case out at the conclusion of the evidence for the Government, but Your Honor did not anticipate that we would rest. Having rested, we trust that we have emphasized and disclosed the weaknesses of the case for the Government. Any one error committed should be sufficient to reverse if Your Honor decided to enter judgment. A combination of the errors should surely reverse. As Your Honor must know by judicial notice of records in this court the plan of the Government is to deprive Mr. DeLucia of citizenship and then deport him. To that end the Government is in need of two convictions. One has been obtained in the New

York case. The Government needs this conviction in order to carry out its plan. We trust that Your Honor will agree that it is important, not only to the defendant, but to our form of government that this conviction be not permitted without due process of law. The responsibility now rests upon Your Honor to make a just decision upon the law and with due process. Such decision can only be contrary to the plan of the Government officials and in favor of the defendant, regardless of any opinion Your Honor may hold concerning the defendant as a person. If this Government is to survive there is not one law for the guilty and another law for the innocent. We must all be equal before the law. When the day comes that the administration of the law depends upon the persons involved, we are all in danger.

We ask that Your Honor not approve of the verdicts and set them aside. If this must mean a new trial we stand ready to meet that when and if it comes. Eventually we hope to see the day when the officials not only perceive that they have no case, but they must realize that we are blessed with courageous trial judges unwilling to surrender conscientious oaths in order to join in a studied plan of persecution. We trust that our confidence in Your Honor is not misplaced. A great deal is at stake in the decision to be made as Your Hopor must know.

In this Honorable Court in conclusion, we say that we hope that Your Honors will perceive that there has been a miscarriage of justice. There must be something wrong with a conviction obtained in the manner shown.

Respectfully submitted,

WM. SCOTT STEWART
Counsel for Petitioner.

SUMMARY OF ARGUMENT.

Some preliminary remarks about our hope that Your Honors will see fit to take this case.

The prosecutor distorted his case in order to make it appear to be similar in some respect to the *Holland* case. We distinguish the *Holland* case as to some facts. Of course we rely upon the law there stated insofar as is applicable.

A preliminary statement of the manner in which the prosecutor placed the burden on petitioner and the resulting error.

Description of the various counts.

Reasons for necessity of understanding all of the charges in view of claim that error found by the Court of Appeals as to Counts I and II should have caused reversal of conviction under Count III.

We show something of the efforts of the prosecutor to demonstrate a starting point. We quote from the testimony of Agent Klein to show that a starting point should not be predicated here.

We explain the manner in which the Ruggaber Report had been compiled to demonstrate that it was based on hearsay. Further that the figures are the result of an arbitrary adjustment made for the purpose of a civil claim in 1945. This Report is the foundation for a table (Exhibit 181, p. 341) compiled by Agent Mahon as an expert to establish a starting point of cash available at the end of 1947 as $48,697.01. The table is worthless as evidence.

In 1946, the Agents realized the danger of lack of evidence to support a claim as made the basis of a 90 day letter that petitioner had obtained about $404,000. So

the Government compromised the claim on the basis that petitioner had obtained about $227,000. Petitioner denied receipt of any money. Then in 1958 in a criminal case without anything but the hearsay report, the Government is permitted to establish that petitioner received $227,000 and no more. There must be something wrong in such use of an Agent's Report.

We quote from the cross-examination of Agent Mahon to show that in making his table he gave no heed to a portion the cross-examination of Agent Ruggaber which caused the Agent to admit that he had no way of knowing what amount of money if any, petitioner had received. The expert said that there had been no such examination. We explain from the evidence the manner in which Agent Ruggaber reduced the availabble funds from about $404,000 to about $227,000. If he had left the first figure stand, the Government would have had no case. $404,000 was enough money to cover expenditures. The manner in which the books were kept and the parole reports rendered is described. We explain the purpose of a preliminary motion wherein the books were introduced. The cross examination of Agent Mahon demonstrates that for the purpose of forming an expert opinion, he twisted the testimony and read into Agent Klein's report an item which was not there and which was important to the assumptions made by him as to a starting point.

We point to evidence put in by the Government which destroys one of the assumptions made by Agent Mahon. When confronted by evidence that petitioner had $90,000 in a year in which Agent Mahon assumed he had nothing, the expert said he disregarded this because it had not been proven that this $90,000 belonged to petitioner. The circumstances proven failed to reveal a likely source of unreported income.

The District Court in an instruction (No. 102, p. 588) given at the request of the Government took important questions of fact from the jury and decided them against petitioner as matters of law.

We quote from the opinion of the Court of Appeals to show error found by that Honorable Court in holding petitioner responsible for things said by others during the investigation. The Court of Appeals held that this error required reversal only as to Counts I and II. We demonstrate that the error also contaminated the conviction under Count III.

We quote from the Court of Appeals as to source of unreported income and demonstrate that the evidence does not support such a finding.

We point to a line of immaterial evidence introduced by the prosecutor and demonstrate the manner in which this evidence was used in argument by the prosecutor. The Government put in evidence that petitioner when called as a witness in various investigations had always denied the receipt of extortion money. There was nothing but hearsay to prove that he did receive the money. The prosecutor, without foundation argued that petitioner told lies when he testified to the negative.

We quote from the opinion of the Court of Appeals and demonstrate that our point about putting in immaterial evidence merely to claim its falsehood was misconceived by that Honorable Court.

We demonstrate from the argument of the prosecutor that he claimed that the defense of petitioner was that said by others. The argument amounted to the erection of a man of straw.

As we proceeded with our argument from point to point, we demonstrated that the unfounded position taken by the prosecutor was fortified by instructions given at the request of the Government. Instructions tendered by petitioner designed to properly inform the jury were refused.

We quote from the opinion of the Court of Appeals as to the books kept by petitioner and assert that that Honorable Court failed to perceive the nature of our objection to the use of the net worth method.

We demonstrate the manner in which the instructions given at the request of the Government concerning books were prejudicial. Also that those tendered by petitioner designed to help the jury concerning the law applicable, were refused.

We demonstrate the manner in which the prosecutor in argument improperly shifted the burden to petitioner by misstating the defense. The defense was of that permitted under a plea of not guilty, a demurrer to the evidence. We point to instructions given at the request of the prosecutor calculated to cast the burden on petitioner.

We quote from that said by the Court at the time of sentence to show that the Court had misconceived the issues and no doubt had been influenced against petitioner by extraneous matters brought to bear by the prosecutor.

We set out an instruction (No. 56, p. 578) given at the request of the Government to tell the jury that explanations given during the investigation by representatives of petitioner could be used against petitioner. This is one of the erroneous views of the law to impel the Court of Appeals to reverse as to Counts I and II. That Honorable Court overlooked the fact that the instruction applied the erroneous rule to all counts.

We quote from the opinion of the Court of Appeals and demonstrate that that Honorable Court failed to perceive the *"defense position"*. The Court of Appeals assumed that the *"defense position"* was as outlined to the jury by the prosecutor. This was a maneuver that many have helped to obtain a conviction without proof of a starting point or a source. This unfounded position was fortified by instructions given at the request of the Government. Partly because of this misconception by the Court of Ap[illegible]s that Honorable Court found a jury question where [illegible] existed.

We quote from the argument of the prosecutor in order to show what he meant by an alternative method, reflected in the instructions given at the request of the Government and demonstrate that such method was inapplicable. Under it the prosecutor claimed that the Government was not obliged to prove a starting point or a source. The Court of Appeals designated this as a net worth case and overlooked the fact that the prosecutor had evaded the requiments of such method. The Court refused instructions tendered by petitioner designed to inform the jury of the necessity of proof of the elements of the net worth method.

We point out the error of Instruction No. 102, p. 588 which took from the jury important questions of fact and determined them against petitioner as matters of law. In doing this, we argue, the Court may have taken into consideration the Report of Agent Smith as the Court inspected this report *in camera*. If so, the Report should have been put into evidence by the Government. At least petitioner should have seen it. Petitioner was convicted on evidence he never heard or saw.

The District Court refused to require the prosecutor to deliver certain statements examined by the Judge *in camera*. The Court of Appeals has held that no error was committed. The questions presented by the record are as follows:

(1) If § 3500 had not been enacted would it have been error for the Court to refuse to require delivery of the papers on the ground stated, *i.e.*, that they could have been of no value to the defense?

(2) If the answer to (1) is yes, the question arises, was it error to refuse, after application of § 3500?

(3) If it would have been error under the *Jencks* case and not error under § 3500, has Congress the Constitutional power to change the practice in the light of the *Jencks* case?

(4) In view of the fact that the Government was obliged to prove the materiality of certain statements and the Court took this question from the jury by instruction after an inspection *in camera* does not this amount to conviction on evidence not heard or seen by petitioner?

We argue that the verdicts were inconsistent. By the not guilty the jury indicated that there was insufficient evidence to establish a vital element necessary in the remaining counts.

We claim that error was committed in the language adopted by the Court at the request of the Government in a supplemental instruction given to the jury after retirement.

Prayer for Writ.

Wherefore your petitioner respectfully prays that a writ of certiorari be issued directed to the United States Court of Appeals for the Seventh Circuit, that the judgment be reversed and that your petitioner may have such other and further relief as to this Honorable Court may seem meet and just.

PAUL DELUCIA

By
WM. SCOTT STEWART
Counsel for Petitioner.

APPENDIX

In the

United States Court of Appeals

For the Seventh Circuit

No. 12399 SEPTEMBER TERM 1958—SEPTEMBER SESSION 1958

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
PAUL DELUCIA,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

December 31, 1958

Before DUFFY, *Chief Judge*, HASTINGS and PARKINSON, *Circuit Judges*.

PARKINSON, *Circuit Judge*. Defendant-appellant, hereinafter referred to as DeLucia, was found guilty by a jury on the first three counts of a four count indictment returned and filed on March 4, 1957. The fourth count charged DeLucia and one Joseph Bulger with conspiracy. The jury acquitted both defendants on Count IV.

Counts I and II charged DeLucia with violation of § 7201, Internal Revenue Code of 1954, in that he willfully attempted to evade payment of his income tax for the years 1948 and 1949 by making false statements concerning his income for those years. Count III charged a violation of § 145(b), Internal Revenue Code of 1939, alleging that DeLucia filed a false return for the year 1950.

DeLucia was sentenced to serve three years and to pay a fine of $5,000 as to each count, the sentences to run consecutively. This appeal followed.

DeLucia attacks his conviction on Counts I and II upon the theory that there was a complete failure of proof that he made or caused to be made any false statements concerning his income for the years 1948 and 1949.

The first false statement, according to the Government, was made on September 1, 1954, when DeLucia with two attorneys, a Mr. Bernstein and Mr. Stewart, his present counsel, appeared before Mr. T. N. Smith, Group Supervisor, and Special Agents Stonesifer and Scholz of the Internal Revenue Department. A transcript was made of this meeting and is in the record.

We have carefully read that transcript. At no time did DeLucia make any statement, sworn or otherwise. Though there are several references to a $300,000 cache, which the Government claims is non-existent, such references can not be considered averments. Actually this meeting amounted to little more than verbal fencing between De Lucia's attorneys and the Internal Revenue Agents. It is highly improbable that a layman such as DeLucia would understand half of what transpired. We quote the following relevant portion from the transcript which illustrates the inefficacy of the conference:

> "Mr. Smith: I don't want to be in the position where you gentlemen bring this witness in and you are going to sit here and testify for him.
>
> "Mr. Stewart: He is not bound by what we say here. That goes both ways. Mr. D'Lucia is not bound by what you gentlemen say here either. We are not testifying for him. We are trying to straighten matters out and arrive at some understanding in this conference."

Thus there is a total failure to prove that DeLucia made or caused to be made any false statement on September 1, 1954 as alleged in Counts I and II of the indictment.

The second alleged false statement was supposedly made when Bulger, together with Bernstein, DeLucia's tax attorney, appeared before Revenue Agent King on November 19, 1954 and testified that he had counted $300,010 in the possession of DeLucia shortly prior to the prosecution years. DeLucia was not present when Bulger so testified. DeLucia contends that in the absence of competent evidence that he procured, knew of, or ratified Bulger's testimony it can not be attributed to him for the purpose of sustaining Counts I and II.

The Government in order to establish a connection between Bulger's testimony and DeLucia's intent to defraud relies on two points. The first is that at the Grand Jury hearing on DeLucia Bulger testified that he had given the testimony before King at the request of DeLucia. DeLucia was not present at this hearing. A transcript of this was read into evidence in the trial below. DeLucia's counsel objected to the admission of this evidence in that it was not competent as to DeLucia. With this we agree. This evidence was perfectly proper as to Bulger under Count IV but as to DeLucia under Counts I and II it was nothing more than hearsay.

Therefore, ignoring all that took place at the Grand Jury hearing we turn to the Government's second point. Here it is argued that inasmuch as Bernstein had Power of Attorney to do all things in relation to DeLucia's tax matters that DeLucia could himself do when Bernstein brought Bulger before Agent King it had the same legal import as if DeLucia himself had done so. This argument fails in several respects. There is no showing that Bernstein was aware that Bulger would tell a false story, as we assume he did. Hence Bernstein was not culpable in any manner and there is nothing of an illegal nature that we may import to DeLucia.

Secondly while it is probable DeLucia would have known Bulger's story to be false there is absolutely no competent evidence showing that DeLucia knew Bulger was to testify or had testified before Agent King. While it is true that Bernstein had been DeLucia's tax attorney

for a number of years this does not prove that DeLucia was informed of all that Bernstein did in relation to the former's tax matters. As to whether DeLucia told Bulger what to say and whether he intended that the story should be related to Agent King or at any other time is, from the competent evidence in the record, mere speculation.

The Government cites several cases to sustain its argument that the action of an attorney may be chargeable to the client. However, in the first case cited, *Banks* v. *United States*, 8 Cir., 1953, 204 F. 2d 666, the attorney there did nothing more than relay to the Government agents written answers furnished by his client to specific questions tendered by the agents.

In the second case, *United States* v. *Bender*, 7 Cir., 1955, 218 F. 2d 869, this court merely held that where an attorney submitted an auditor's work sheet to explain discrepancies in his client's tax return, the Government had not obtained the work sheet improperly and it could be admitted in evidence.

In *Gariepy* v. *United States*, 6 Cir., 1955 220 F. 2d 252, the defendant at the trial identified the income tax return, supposedly submitted by others, as his own. In addition the court charged the jury that it could not find the defendant guilty unless it found beyond a reasonable doubt that he had knowledge of the falsity of the returns filed.

The defendant in the case of *United States* v. *Albanese*, 2 Cir., 1955, 224 F. 2d 879, had admitted that the returns submitted were his and that he had given permission to others to sign them for him.

Therefore, in three out of the four cases there was substantial proof, through admissions, or otherwise, that defendant was aware of the relevant act committed by others in his name. In the *Bender* case, while it was not directly shown that the defendant knew his attorney was submitting the auditor's work sheet, the submission thereof did not constitute the gravamen of the offense complained of, as it does here.

This Court is not now holding that circumstantial evidence could not supply the connection between Bulger's testimony and DeLucia's intent. Such undoubtedly could be done, *Canton* v. *United States*, 8 Cir., 1955, 226 F. 2d 313. What we do say is that where, as here, an attorney acting in good faith offers a witness who gives false testimony before Internal Revenue agents and there is no showing, circumstantial or otherwise, that the client knew that such testimony was given, the attorney's act can not be imputed to the client to constitute willful fraud.

We, therefore, hold that there was a total failure to prove a necessary element of the offense charged in both Count I and Count II; that the evidence is clearly insufficient to support the verdict of guilty as to those two counts; and the District Court erred in denying DeLucia's motion for judgment of acquittal on Counts I and II.

DeLucia next contends that the offense charged in Count III was barred by the six year statute of limitations. The indictment was returned and filed on March 4, 1957 charging in Count III that DeLucia had filed a false and fraudulent return on or about March 5, 1951. Government's Exhibit No. 22 is a photostatic copy of DeLucia's 1950 return. There is on the face of the return a stamp bearing the legend: "Received Mar. 5, 1951 Coll. Int. Rev. 1st Dist. Ill. No. 8."

Moreover, when counsel for the Government offered Government's Exhibit No. 22 in evidence pursuant to agreement and stipulation of the parties it was stated to the jury and for the record that it was "filed with the Collector of Internal Revenue in the First District of Illinois on March 5, 1951." DeLucia first raised the question as to whether the date on the stamp was correct on his motion for a new trial. He offered no evidence to prove the date was not affixed when the return was received by the Internal Revenue Department. His objection now is not well taken.

DeLucia also objects to the refusal of the trial court to direct the submission to him of certain memoranda in the possession of the Government. The Court reviewed the

memoranda *in camera* and correctly decided only one had any relation to the testimony of Agent Smith, the author of the memoranda. This one was turned over to the defendants. It is now contended that such refusal was in violation of the mandate laid down in *Jencks* v. *United States*, 1957, 353 U.S. 657.

The District Court was, however, following the provisions of 18 U.S.C.A. § 3500 and as was said in *United States* v. *Spangelet*, 2 Cir., 1958, ... F. 2d .....:

> "However, the defendant argues that the mandate in the *Jencks* case is a constitutional edict and that Sec. 3500, if it narrows the holding of the *Jencks* decision in any regard, is unconstitutional. We cannot agree. As we read the *Jencks* case, its rule is an exercise by the Supreme Court of its supervisory power over the 'administration of criminal justice in the federal courts'. See *McNabb* v. *United States*, 318 U.S. 332, 340-42. We find no indication in *Jencks* that the standards it set forth were constitutionally required. It follows that once Congress has entered the field its determination of proper federal criminal procedure is controlling. We conclude that Sec. 3500, in that it fails to apply the *Jencks* procedure * * * * is not unconstitutional."

We agree with the Second Circuit and hold that DeLucia's contention that 18 U.S.C.A. § 3500 is unconstitutional is without merit.

As DeLucia's complaint concerning instructions relates solely to Counts I and II of the indictment what we have heretofore held dispenses with necessity for any comment thereon.

DeLucia also contends that where he himself kept a set of books and records the District Court erred in permitting use of the net worth method of proof. This would mean that simply because taxpayer has kept a set of books, the veracity of which is in question, the Gov-

ernment is estoppel from going beyond those books to prove their falsity or inaccuracy. This is absurd. *Holland* v. *United States*, 1954, 348 U.S. 121, 131-132.

DeLucia's main thrust is delivered at the Government's evidence sustaining the net worth method of proof. He claims that the Government not only changed its position from time to time but in failing to prove his net worth at any particular date it left it to the jury to speculate and guess as to his guilt. With this we can not agree.

The Government undertook to prove what assets defendant had on hand at the beginning of 1948 by means of showing his entire preceding financial history. Much of this evidence was admitted by stipulation. The first step was to show what income DeLucia had received from all sources from 1920 to December 31, 1947. The Government then proceeded to introduce evidence of all known expenditures during this same period.

The Government also checked the income tax filing record of DeLucia's wife, Nancy, under both her maiden and married names for all prior years. A check was made of Internal Revenue Gift and Estate tax records, probate records, bank accounts, brokerage houses and insurance company records. As a result of this investigation the Government contended that DeLucia could not have had more than $48,697.01 at the beginning of 1948.

The cash on hand at that date was the central issue in the case, the defense position being that there was at least $300,000 on hand and the Government's position that there was no more than $48,697.01. The jury resolved the issue against DeLucia and we can not say that in doing so the verdict is not adequately supported by the evidence. In *Holland* v. *United States*, 1954, 348 U.S. 121, 133-134, the Court said:

> "The Government also negatived the possibility of petitioners' accumulating such a sum by checking Mr. Holland's income tax returns as far back as 1913, showing that the income declared in previous

years was insufficient to enable defendants to save any appreciable amount of money. The jury resolved this question of the existence of a cache of cash against the Hollands, and we believe the verdict was fully supported."

With this as a starting point the Government went on to show that DeLucia had made large expenditures that far exceeded any reported income.

It was stipulated at trial that during the years 1948, 1949 and 1950 and until March 1954 DeLucia was on parole as a result of a previous conviction. Parole reports filed by him during the prosecution years were admitted into evidence by stipulation. These reports show personal and farm expenditures in the amounts of $217,107.37 for 1948; $120,933.14 for 1949 and $118,770.76 for 1950. These amounts are in substantial agreement with the expenditures shown on DeLucia's books also in evidence. The defendant's income tax returns for the same years showed no net income and, in fact, reported losses as follows: 1948, $ - 18,944.71; 1949, $ - 2,282.95; 1950, $ - 9,838.82.

In addition to the proof of expenditures exceeding the reported income the Government also shows a possible likely source of this unreported income.

During the period 1944 to March 1954 DeLucia was either imprisoned or on parole and his returns for that period disclosed no income that can not be readily accounted for upon the face of the returns. However, his return for the year 1954, which was the first year he was free of parole, reported $76,512 from "Personal wagering at tracks, etc." His 1955 return reported $86,050.92 from the same source and his 1956 return reported $78,460 from "miscellaneous". We think the jury could very easily have believed that DeLucia simply did not report his income from such illicit activities during the period that he was on parole, but did continue to receive such income out of which he made the large expenditures dur-

ing the years in question. In *United States* v. *Frank*, 3 Cir., 1957, 245 F. 2d 284, 287, the Court said:

> "It was also shown that the defendant on several of his income tax returns had reported a gain from 'sporting enterprises,' an euphemistic term for gambling profits. He did not return any for 1948 and it is suggested that this form of activity was another possible source of income. This point was quite thoroughly developed and the defendant's method of bookkeeping, or lack of bookkeeping, for his sporting enterprises was shown. This was all relevant and its weight for the jury."

We hold that the above evidence, in so far as it relates to Count III, was sufficient for the jury to find that DeLucia had failed to report income during the taxable year 1950.

DeLucia originally asserted in his briefs herein that there was inconsistency between the verdicts of guilty and of not guilty and quoted from the dissenting opinion in *Dunn* v. *United States*, 1932, 284 U.S. 390. However, the majority opinion in that case said on page 393:

> "Consistency in the verdict is not necessary. Each count in an indictment is regarded as if it was a separate indictment. *Latham* v. *The Queen*, 5 Best & Smith 635, 642, 643. *Selvester* v. *United States*, 170 U.S. 262."

This Court said in *United States* v. *Bazzell*, 7 Cir., 1951, 187 F. 2d 878, 884:

> "As to the argument that the verdict is inconsistent, it will be enough to say that where a defendant is charged by two or more counts in an indictment, consistency between the verdicts on the several counts is not necessary. *Dunn* v. *United States*, 284 U.S. 390, 52 S. Ct. 189, 76 L.Ed. 356; *United States* v. *Denny*, 7 Cir., 165 F. 2d 668; and *United States* v.

Coplon, 2 Cir., 185 F. 2d 629, 633. A verdict of acquittal on one count does not invalidate a verdict of guilty on another count, although the same evidence is offered in support of each. *Garrison* v. *Hunter*, 10 Cir., 149 F. 2d 844, 845. See also *United States* v. *Pandolfi*, 2 Cir., 110 F. 2d 736."

Moreover, counsel for DeLucia conceded in oral argument in this Court, and correctly so, that there is no inconsistency between the verdicts of not-guilty on Count IV and of guilty on Count III. As we are now concerned only with Count III what has been said is completely dispositive of any vestige of inconsistency.

DeLucia also contends that the Government switched its positions in regard to the alleged hoard of money that he had. However, with this we cannot agree inasmuch as it appears from the record that the Government has always contended that DeLucia did receive a large sum through extortion and that it has been taken into account in the itemization of DeLucia's income. If anybody is changing positions it is the defendant who has at times denied that he received the money and on other occasions claims by innuendo that this constituted the sum from which he made the various expenditures in the years in question.

Defendant's last objection goes to the supplemental instruction given to the jury on the second day of deliberation. Counsel for both the Government and defendant presented instructions to the Court based on the holding of the United States Supreme Court in *Allen* v. *United States*, 1896, 164 U.S. 492. Defense counsel made certain objections to the version of the *Allen* charge submitted by the Government and the Court acceded to some of these objections and refused others. The supplemental instruction as thereafter given by the Court has been approved by this Court almost *in haec verba*. *United States* v. *Furlong*, 7 Cir., 1952, 194 F. 2d 1.

We, therefore, hold that the Court did not err in giving the supplemental instruction.

The portion of the judgment based upon Counts I and II is reversed and cause remanded with instructions to grant the motion of the defendant for judgment of acquittal thereon.

The portion of the judgment based upon Count III is AFFIRMED.

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No. 745

In the Supreme Court of the United States

OCTOBER TERM, 1959

PAUL DELUCIA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the Court of Appeals (Pet. 163–173) is reported at 262 F. 2d 610.

JURISDICTION

The judgment of the Court of Appeals was entered on December 31, 1958 (Pet. 163), and a petition for rehearing was denied on February 5, 1959. The petition for a writ of certiorari was filed on March 3, 1959. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

QUESTIONS PRESENTED

1. Whether the evidence was sufficient to support the verdict.

2. Whether the District Court erred in the admission of evidence, not objected to by the petitioner, consisting of (*a*) an expert accountant's opinion as to the maximum amount of cash petitioner might have had on hand as of December 31, 1947; and (*b*) the reports of two Treasury agents setting out the results of their investigation into petitioner's tax liability for earlier years.

3. Whether there is a fatal inconsistency between the Court of Appeals' reversal of the convictions on Counts I and II (relating to petitioner's income taxes for 1948 and 1949) and its affirmance of the conviction on Count III (relating to his 1950 income taxes).

4. Whether, after a Government witness had testified only to an admission made to him by petitioner in 1956, the District Court erred in refusing to require the production, for the use of defense counsel in cross-examination, of copies of reports the witness had made to the Government prior to 1956.

5. Whether petitioner's acquittal on Count IV (a conspiracy count) requires reversal of his conviction on Count III (a substantive count).

6. Whether the District Court erred in giving the jury a supplemental instruction.

STATUTE INVOLVED

Internal Revenue Code of 1939:

SEC. 145. PENALTIES.

* * * * *

(b) *Failure to Collect and Pay Over Tax, or Attempt to Defeat or Evade Tax.*—Any person required under this chapter to collect, account for, and pay over any tax imposed by this

chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

* * * * *

(26 U.S.C. 1952 ed., Sec. 145(b)).

STATEMENT

On March 4, 1957, petitioner was indicted in the United States District Court for the Northern District of Illinois, Eastern Division, on three counts for wilful attempted evasion of his individual income taxes for the years 1948 through 1950, in violation of Section 145(b) of the Internal Revenue Code of 1939. The indictment alleged that petitioner and his wife had received unreported income during those years, resulting in tax deficiencies as follows (AA. 2–5):[1]

Year	*Unreported tax liability*
1948	$75,201.14
1949	17,589.54
1950	35,555.88
Total	$128,346.56

[1] The appellant's appendix in the Court of Appeals, consisting of three volumes with pages numbered 1 to 683, is designated "AA." The Government's appendix in the Court of Appeals, consisting of one volume with pages numbered 1 to 461, is designated "GA."

The indictment also contained a fourth count, in which petitioner and one Bulger were charged with conspiring to make false and fraudulent statements in a matter within the jurisdiction of the United States Treasury Department, in violation of 18 U.S.C., Section 371 (AA. 6–7).

After a jury trial, petitioner was found guilty on the first three counts. Both defendants were acquitted on the conspiracy count (AA. 642). Petitioner was fined $5,000 on each of the counts on which he was convicted, and given three consecutive three-year prison terms (AA. 668). For reasons discussed hereinafter (*infra*, p. 14 and fn. 7), the Court of Appeals reversed petitioner's conviction on the first two counts and affirmed as to Count III. (Pet. 163–173; *United States* v. *DeLucia*, 262 F. 2d 610.)

The evidence to support the verdict may be summarized as follows:

On the 1950 individual income tax return of petitioner there was reported a net loss of $9,838.82, resulting mainly from the operation of his farm (AA. 101–106). The Government's evidence showed that, on the basis of petitioner's receipts and expenditures,[2] his true 1950 income was $61,915.14, on which he owed a tax of $23,754.84 (AA. 528, 540; GA. 461). The great majority of the expenditures were stipulated (*e.g.*, AA. 27–38, 106–114, 276–280), and the others were uncontroverted. The principal issue at the trial was the accuracy of the computation by

[2] On his own books petitioner always computed his income by the expenditures method (AA. 168–169, 183–185).

which the Government had fixed petitioner's maximum undeposited cash on hand as of December 31, 1947, at $48,697.01 (GA. 449).

The Treasury agents made a thorough search of gift tax returns and estate tax returns in the family names of petitioner and his wife, in a quest for evidence of the receipt of non-income funds, but with negative results (AA. 325; GA. 185).

Petitioner entered the United States in 1920, when he was 22 or 23 years old (AA. 88).[3] Petitioner filed no income tax returns for the years 1920 through 1933 (AA. 106–107, 326; GA. 184–185). He did file income tax returns for the years 1934 through 1947, except that he filed no return for the year 1944 (AA. 89). The total income reported by petitioner from 1934 through 1947 was $509,816.58 (AA. 107–113, 326, 377; GA. 449). He had also received certain non-income funds and substantial unreported income during many of those years, as disclosed by previous examinations by Treasury agents. The total of these additional funds was $293,479.80, which comprised (1) $227,781.46 of unreported income received by petitioner during the years 1935 through 1940 as his share of monies extorted from producers and distributors of motion pictures (AA. 116–126; GA. 11, 20–22, 449);[4] and (2) $65,698.34 of other funds re-

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[3] This Court has already had occasion at the present term to deny a petition for certiorari filed by this petitioner in connection with a denaturalization proceeding against him. *Paul DeLucia* v. *United States*, 358 U.S. 836.

[4] Petitioner was given credit for the entire $227,781.46, despite the fact that he had five times denied under oath that he had ever received any extortion money (AA. 443–447, 492,

ceived by petitioner over the years, some of it resulting from technical adjustments to his reported income and the remainder consisting of non-income receipts of funds, such as loans and returns of capital (AA. 353, 354–356; GA. 449). The Government, by adding petitioner's reported income, unreported income, and non-income funds, arrived at a total of $803,296.38 of gross funds available to petitioner over the 14-year period (AA. 357; GA. 449). The grand total of petitioner's proved expenditures over the same period was $757,875.47, which, when subtracted from the gross funds available (after a minor adjustment),[5] resulted in a difference of $48,697.01, which reflected the maximum possible cash petitioner could have had on hand at the beginning of the prosecution years, December 31, 1947 (AA. 357–358; GA. 449).

The Government then proceeded to establish that on the basis of his proved expenditures petitioner had

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498; GA. 29–32, 265, 269) and despite the fact that petitioner had settled the Government's tax claims for those years by paying tax on only half of the $27,781.46 (AA. 127, 160, 154).

In 1944, petitioner and six others were convicted in the United States District Court for the Southern District of New York of conspiracy to extort money. The convictions were affirmed on appeal. *United States* v. *Compagna*, 146 F. 2d 524, certiorari denied, 324 U.S. 867.

[5] During 1934, the first year of the computation, petitioner's proved expenditures exceeded his gross funds available by $3,276.10. Since it was possible that petitioner could have accumulated savings of that amount in earlier years, even though not earning enough income to have been required to file tax returns, the Government, rather than arrive at a negative cash on hand position at the end of 1934, treated the $3,276.10 as having been on hand at the beginning of that year (AA. 357–358; GA. 449, 453).

received the following net income during the prosecution years, as compared with the losses reported on his tax returns (AA. 90–106, 528, 533–540):

Year	Reported Net income	Corrected
1948	$18,944.71 (Loss)	$131,616.63
1949	2,282.95 (Loss)	34,002.89
1950	9,838.82 (Loss)	61,915.14

Between 1937 and 1943, petitioner customarily reported on his tax returns unidentified "Miscellaneous Income" or "Other Income" in amounts ranging between $39,000 and $80,000 per year (AA. 109–111, 123–126, 190). He ceased this practice between 1945 and 1947 (when he was serving a prison sentence on his conviction for conspiracy to extort—*supra*, p. 5, and fn. 4; AA. 491) and between 1948 and 1953, when he was on parole (AA. 88, 512). For the years 1954, 1955, and 1956, petitioner again reported large lump-sum amounts of miscellaneous income, now identified as "Personal wagering at tracks, et cetera" (AA. 512–513). During the years of his incarceration petitioner reported only nominal income (AA. 112–113; GA. 449). During those two years, however, he received a number of visits from a notorious reputed racketeer (who came under an assumed name) and another individual, who was in the coin or slot machine business. Petitioner complained to the reputed racketeer about the manner in which his (petitioner's) interests in coin and slot machines were being handled during his incarceration, and was disturbed about the differences of opinion on that subject between his two visitors (AA. 489–492).

The defense adduced no evidence.

ARGUMENT

1. Petitioner's first points (Pet. 2–5) comprise two challenges to the sufficiency of the evidence: (*a*) the solidity of the "starting point" and (*b*) the showing of a "likely source" of unreported taxable income. The contentions are without merit.

(*a*) The expenditures method used to prove the Government's case here is nothing more than a variation of the net worth method. Both have been approved by this Court. *United States* v. *Johnson*, 319 U.S. 503; *Holland* v. *United States*, 348 U.S. 121. Just as in a net worth case the Government establishes the receipt of taxable income by a comparison between the taxpayer's net worth at the beginning and end of the year, and by adding thereto his other non-deductible expenditures, so in a pure expenditures case the receipt of taxable income is proved by a comparison of cash receipts and expenditures, without regard to whether those expenditures have come to rest in tangible assets at the end of the taxable period. In using either method, of course, it is incumbent on the Government to establish a solid starting point for the computations, in order to foreclose the explanation that what appears to be unreported income may simply reflect the use of cash or other assets on hand at the beginning of the taxable year. Such a starting point was amply proved in the case at bar. In making an exhaustive examination of the records of gift and estate tax returns on file, and the records of banks, the

Treasury agents did what they reasonably could to eliminate the likelihood that petitioner might have had cash on hand resulting from gifts, inheritances, or loans. From petitioner's failure to file income tax returns until 1934, the jury could readily infer that his total net income until that time was not in excess of $30,500 (GA. 453), and that the bulk of his earnings must have been used for living expenses between 1920 and 1933. Beginning with the year 1934, the Government reconstructed petitioner's reported net income from his tax returns, adding to those figures additional unreported income, as determined by earlier examinations made by Treasury agents, and non-income funds received by petitioner. After subtracting the total of his proved expenditures between 1934 and 1947, the Government arrived at a difference of $48,697.01, which represented the maximum amount of cash petitioner could possibly have had on hand as of December 31, 1947, the beginning of the prosecution years (*supra*, pp. 5–6). Petitioner chose not to present any witnesses to challenge this figure. Cf. *Holland* v. *United States*, 348 U.S. 121, 138–139. That the Government did not understate his cash on hand is attested to by petitioner's own books, which disclosed that (1) his total undeposited cash on hand at the end of 1939 (including cash in vault, in pocket, and in transit to a stockbroker) was $20,573.21, compared with the Government's figure of $180,891.32 (AA. 182–183; GA. 449); and (2) that his total undeposited cash on hand at the end of 1943 was no more

than $200 compared with the Government's figure of $155,637.53 (AA. 192, 199; GA. 449). Moreover, petitioner on one occasion told a Treasury agent that while he was in the penitentiary (1945 to 1947) it was necessary for his wife to "live off the farm" (AA. 491, 505).

At the beginning of the trial, the defense was concerned as to whether the prosecution would give petitioner credit for some $404,000 in extortion money which the Government, in earlier civil proceedings, claimed he had received between 1935 and 1940 (*supra*, p. 5, and fn. 4; AA. 141; GA. 21–22, 449). Although petitioner concedes that he "never, at any time, claimed that the money he had spent, or accumulated, came from this extortion money" (Pet. 80), he still advances the argument that the Government should have added the entire $404,000 to his reported income, thus making the assumption that none of the extortion proceeds were included in the $177,000 of unidentified "Other Income" and "Miscellaneous Income" reported by petitioner on his tax returns for the years 1937 through 1940 (*supra*, p. 7; AA. 123–126). Petitioner overlooks the evidence which showed that (1) he has denied under oath on no less than five occasions that he ever received *any* of this extortion money; and (2) in the civil tax proceedings the Government took exactly the same position that it took in the criminal case, i.e., that $177,000 of the $404,000 was reported as income, and the other $227,000 was unreported, but petitioner settled the civil tax claims by paying tax on only half of the $227,000 (*supra*, p. 5 and fn. 4). It should be noted, moreover, that even

on petitioner's theory the additional $177,000 with which he claims he should have been credited as of December 31, 1947, would have been entirely absorbed in the $186,847.18 of unreported income proved for the years 1948 and 1949, leaving intact the $61,915.14 of unreported income proved for 1950, the only year which is before this Court (*supra*, pp. 4, 7).

(*b*) The Government established a "likely source" of unreported taxable income by showing that both before his incarceration and after the expiration of his term of parole (1954) petitioner customarily reported as income vast sums identified only as "Miscellaneous Income," "Other Income," or "Personal wagering at tracks, et cetera," and that during his incarceration he retained his interests in coin and slot machines (*supra*, p. 7). From this evidence, as the Court of Appeals held, the "jury could very easily have believed that [petitioner] simply did not report his income from such illicit activities during the period that he was on parole, but did continue to receive such income out of which he made the large expenditures during the years in question" (Pet. 170–171). Moreover, the burden on the Government is not necessarily to prove a "likely source," but to show that the funds in question arose from current taxable income. *Holland* v. *United States*, 348 U.S. 121, 137–138; *United States* v. *Massei*, 355 U.S. 595. In the case at bar, the Government introduced evidence tending to show that the funds could not have arisen from gifts, loans, or inheritances (*supra*, p. 5).

We submit that the evidence to support the jury's verdict of guilty was sufficient.

2. Petitioner contends (Pet. 3–4) that the District Court erred in the admission of hearsay evidence, consisting of (*a*) the Government's estimate of the amount of cash petitioner could have had on hand at the end of 1947, and (*b*) the reports of two internal revenue agents who had examined his returns for years prior to the prosecution years. This argument, which was not raised in either of the courts below, is plainly without substance.

(*a*) As we have shown (*supra*, pp. 5–6), the Government's estimate of the maximum amount of cash which petitioner could have had on hand at the end of 1947 was based upon solid proof, including an exhaustive analysis of petitioner's income tax return filing history, his receipts of non-taxable funds, and his expenditures. The two agents who computed the figure (both expert accountants) testified at length as to their method of doing so, without objection from petitioner (AA. 324, 351–360, 526, 533–534). The summary chart prepared by them, showing their computations in detail, was received in evidence, and copies of it were distributed to the jurors, all without objection by petitioner (AA. 331, 353; GA. 219–220). It is well settled that charts of this kind, when based upon documents themselves competent and accessible, are admissible. *United States* v. *Kelley*, 105 F. 2d 912, 918 (C.A. 2d); *Graves* v. *United States*, 191 F. 2d 579, 584 (C.A. 10th); *Bell* v. *United States*, 185 F. 2d 302 (C.A. 4th), certiorari denied, 340 U.S. 930; *Gendelman* v. *United States*, 191 F. 2d 993, 996–997 (C.A. 9th), certiorari denied, 342 U.S. 909; Cf. *Holland* v. *United States*, 348 U.S. 121, 127–128.

(*b*) The investigation reports of Agents Klein and Ruggaber were introduced into evidence not only without objection by defense counsel, but with his full concurrence (GA. 33, 218).* True, counsel stated that he was suggesting their admission because he believed "that the case has developed to the point that a correct understanding of the record requires those reports to be in" (GA. 33), but it was counsel himself who allowed that development by permitting Klein to testify as to his investigation, without any objection (AA. 166–174), and by permitting Ruggaber to testify on direct examination as to his investigation, without any suggestion that hearsay evidence was involved (AA. 115–125, 258–263). On cross-examination of Ruggaber, defense counsel attempted to bring out that some of the conclusions in his report were based on hearsay (AA. 129–135), but did not move to strike any of his testimony, and later agreed that the report should be received in evidence (GA. 33). Petitioner's present argument, then, goes to the weight of the evidence rather than its admissibility. But it is settled that when hearsay evidence is "admitted without objection it is to be considered and given its natural probative effect as if it were in law admissible." *Diaz* v. *United States*, 223 U.S. 442, 450, and cases cited.

3. Equally without merit is the argument (Pet. 4) that the Court of Appeals' reversal of petitioner's conviction on the first two counts requires reversal on

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*Petitioner's counsel objected initially to the admission of these reports, but later withdrew his objection and they were admitted in evidence (AA. 174, GA. 33, 218).

Count III, because "the same error contributed to the conviction on the third count." The first two counts were reversed not because of any weakness in the Government's expenditures case as such, but because the court found no evidence that petitioner himself had made the false statements attributed to him in those counts (Pet. 164, 167).[7] This finding could not possibly apply to Count III, which charged petitioner with having wilfully attempted to evade and defeat his 1950 income taxes by filing a false and fraudulent tax return. It is undisputed that petitioner signed and filed that return (Cf. Pet. 167).

4. Petitioner urges (Pet. 5–6, 142–146) that he was entitled to the production, for use in cross-examining Agent Thomas N. Smith, of reports written by Smith to his superiors in the Internal Revenue Service in 1952, 1954 and 1955 (AA. 311–313, 649). Petitioner relies upon *Jencks* v. *United States*, 353 U.S. 657 and the so-called Jencks statute, 18 U.S.C. Section 3500. The point is plainly without merit. That case and

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[7] Prosecution of petitioner for the filing of false and fraudulent tax returns in an attempt to evade his 1948 and 1949 taxes was barred by the statute of limitations. The indictment alleged that with respect to those taxes the petitioner's attempts to evade took the form of later "making and causing to be made false statements and representations" before officials of the Treasury Department (AA. 3, 4). Cf. *United States* v. *Beacon Brass Co.*, 344 U.S. 43. The Court of Appeals found that the alleged false statements were not made by petitioner and could not fairly be attributed to him, but were more in the nature of "verbal fencing" (Pet. 164) between petitioner's representatives (in his presence) and representatives of the Internal Revenue Service.

statute relate solely to reports of a Government witness touching upon his testimony on direct examination. Here Smith testified only (save for three questions relating to his occupation) as to a conversation he had with petitioner on February 2, 1956, wherein petitioner stated that he had paid $25,000 into a common defense fund for the purpose of paying attorney's fees in connection with the extortion case (AA. 298–299). On February 28, 1956, and again on March 13, 1957, Smith prepared memoranda relating to this conversation, both of which were turned over to defense counsel (AA. 313–316, 432–439). All of the other reports and memoranda of Agent Smith relating to this case were written prior to 1956 (AA. 311–313). No argument is needed to demonstrate that writings prepared by Smith prior to 1956 could not have been reports "touching the events and activities as to which [he] testified at the trial." *Jencks* v. *United States,* 353 U.S. at 668.

5. Petitioner contends (Pet. 6) that the verdict of guilty on Count III is inconsistent with the verdict of not guilty on Count IV, the conspiracy count.[3] The short answers to this argument are that (1) there is no requirement that a jury's verdict be consistent (*Dunn* v. *United States,* 284 U.S. 390); and (2) a "conspiracy to commit a crime is a different offense from the crime that is the object

[3] The Court of Appeals stated: "* * * counsel for De Lucia conceded in oral argument in this Court, and correctly so, that there is no inconsistency between the verdicts of not guilty on Count IV and of guilty on Count III" (Pet. 172).

of the conspiracy."* (*American Tobacco Co.* v. *United States,* 328 U.S. 781, 789 and cases cited.)

6. Petitioner's final contention (Pet. 7) is that the District Court erred in giving a supplemental instruction to the jury. The jury deliberated for approximately ten hours on the day the case was submitted (AA. 603, 630–631). At 10 o'clock the next morning the court gave a supplemental charge urging the jury to reach a verdict if they could conscientiously do so (AA. 632, 637–639), and the verdict came in mid-afternoon of that day (AA. 641–642). There was no objection to the giving of a supplemental charge though petitioner did dispute some of the language employed (AA. 632–637). We submit that the charge, which was based upon that given in *Allen* v. *United States,* 164 U.S. 492, 501, was correct. See also *United States* v. *Furlong,* 194 F. 2d 1 (C.A. 7th), certiorari denied, 343 U.S. 950.

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*This is true *a fortiori* in the instant case, where Count III alleges that petitioner wilfully attempted to evade his 1950 income taxes by filing a false and fraudulent return, and Count IV alleges that he and one Bulger conspired to "knowingly and wilfully make false, fictitious, and fraudulent statements and representations in a matter within the jurisdiction of * * * the * * * Internal Revenue Service, in violation of Sections 2 and 1001, Title 18 * * *" (AA. 5–6).

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

J. LEE RANKIN,
Solicitor General.
CHARLES K. RICE,
Assistant Attorney General.
JOSEPH F. GOETTEN,
RICHARD B. BUHRMAN,
Attorneys.

MAY, 1959.

U. S. GOVERNMENT PRINTING OFFICE 1959

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 745

PAUL DE LUCIA,
Petitioner,

v.

UNITED STATES OF AMERICA.

On petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY

to Government's Brief in Opposition

WM. SCOTT STEWART
Chicago Temple
Chicago 2, Illinois
Counsel for Petitioner

McCORMICK & HENDERSON, INC., CHICAGO, ILL.

IN THE

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UNITED STATES OF AMERICA

On petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY

to Government's Brief in Opposition

May it please the Court:

The Jenck's Case

We respectfully refer Your Honors again to our petition, pp. 136 to 146. It must be understood that the trial Court examined a report *in camera* and decided that it could have no value. We have not seen the report now before Your Honors.

(a) The report was requested in connection with the cross-examination of the witness Agent Stonesifer See our petition p. 141, AA 390.

(b) From the direct testimony of Agent Stonesifer Your Honors will observe that the report became a part of the case. The direct examination of Agent Stonesifer opened up the entire case for cross examination.

(c) The Solicitor General has adopted the tactics of the prosecutor and seeks to confine our demand for the report solely to our desire to cross examine Agent Smith. Such tactics should not prevail, in the light of the record. Please again see our petition, pp. 143-146.

If the Government had not seen fit to obtain continuances* in the matter of the present BRIEF IN OPPOSITION, this petition for certiorari might have been submitted to Your Honors together with others recently argued. (Nos. 435 and 437, *Lev. et al.*, No. 451, *Rosenberg*, No. 491, *Galax Mirror Co. et al.* No. 471, *Palmero*, No. 489, *Pittsburg Plate Glass.*

We respectfully submit that Your Honors should grant certiorari, in the case at bar, in order to include this petition. Each case presents its factual background. The case at bar presents questions not involved in the previous cases—questions not to be evaded in the manner attempted by the Government in the cases heretofore argued.

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* We made no objection to motions for continuance. Now, after having examined the briefs in the other cases, we conclude that perhaps we should have objected and have made an effort to have all of the cases considered together.

The Value of the Evidence

The Solicitor General erects a man of straw by representing our complaint to have been one of error in admission of evidence p. 12. Our point, raised below by motion for acquittal and decided against petitioner in the Court of Appeals, is that the hearsay evidence has no probative value. After all the Government should be required to prove its case.

We trust that after Your Honors study the record that no amount of advocacy or legal legerdemain can sweep that requirement under the rug.

Respectfully submitted,

WM. SCOTT STEWART
Counsel for petitioner

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FURTHER REPLY

to Government's Brief in Opposition

WM. SCOTT STEWART
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Chicago 2, Illinois
Counsel for Petitioner

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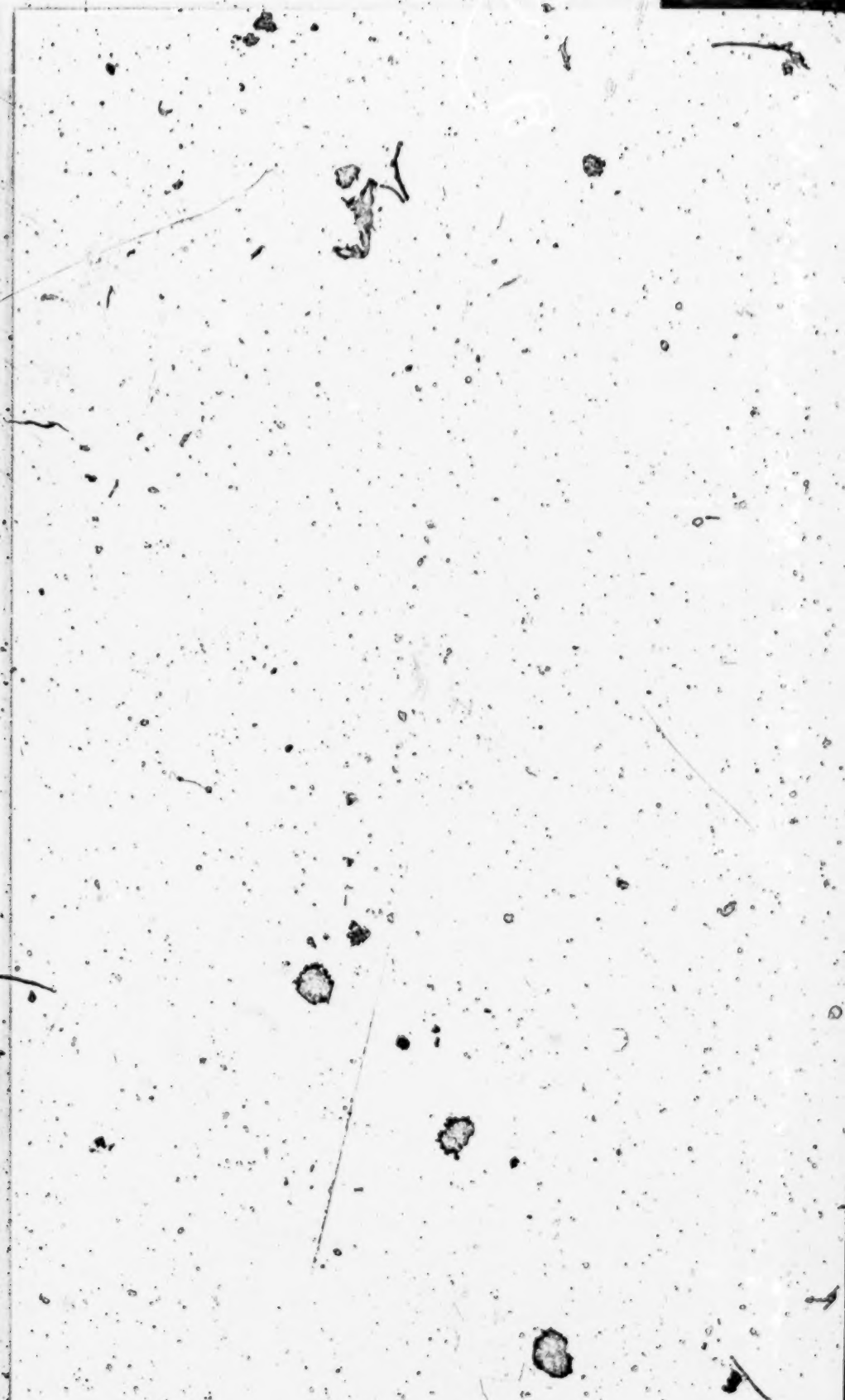

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On petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

FURTHER REPLY

to Government's Brief in Opposition

May It Please The Court:

Fearing that our petition for certiorari might have been presented without it, we hurriedly submitted our "Reply to Government's Brief in Opposition". We believed it important that Your Honors be reminded of other cases recently argued. Cases involving the *Jencks* case rule. Since the filing of our Reply we have examined the briefs

in some of those cases and now beg leave to present this further reply, in order to prevail upon Your Honors, if possible, to include the case at bar in the matter of interpretation of the law applicable. As may be expected each case coming to Your Honors presents its own factual background. It is our respectful contention that the Government has been able to defend its position in each of the other cases, because of facts in those cases not present in the case at bar. We submit that the *De Lucia* case presents questions squarely, which questions require an answer, sooner or later, for the guidance of the lower courts. The trial Judge said, after an examination of the withheld document, that if he thought it would do us any good he would order its delivery. The trial Judge undertook to decide upon the value of the withheld document. Please again see our petition for certiorari, pp. 136 to 146. We do not believe that the right of any trial judge to do this has been as squarely presented in any of the other cases argued before Your Honors.

In *Holland* v. *United States*, 348 U.S. 121, 124, Mr. Justice Clark said, concerning previous cases:

> "We have denied certiorari because the cases involved only questions of evidence and, in isolation, presented no important questions of law."

Your Honors will agree no doubt, that cases should not be decided in isolation, especially where other cases are on the docket. The Government Attorneys should not be allowed to divide and conquer if any such motive was present in their requests for continuances in the case at bar. To divide may be good strategy, if it were the duty of the Government Attorneys to win at all costs. But as Your Honors have said in *Jencks*, 353 U.S. 657, 668, quoting from *Berger*:

"For the interest of the United States in a criminal prosecution is not that it shall win a case but that justice shall be done."

In the case at bar important questions have been presented concerning what might constitute justice. A number of cases have been presented and argued before Your Honors involving related questions. We respectfully submit that the case at bar should be included, before Your Honors reach a decision in the previous cases.

We respectfully submit the following observations concerning the previous cases, in support of our contention that the case at bar should be included by Your Honors in the group, before final decision.

Nos. 435-436-437, Harry Lev v. United States.

The record shows that at the time of the trial the prosecutor did not have in his possession the document made the subject of controversy before Your Honors. The case was tried before *Jencks*. After it reached the Court of Appeals the prosecutor submitted an affidavit in that court, including the controversial statement, which statement was submitted to the Court of Appeals *in camera*. The Government before Your Honors has argued that the error, if any (of non production at trial), was harmless under the circumstances of the case. The Government has put the question, in part, as follows, p. 3, Brief on the merits:

"3. Whether it was error, under *Jencks* v. *United States*, 353 U.S. 657, for the trial court to deny the request of one defendant for production of what proved to be the summary of a Senate investigator's interview with a witness, where the document had not been seen or approved by the witness and was not then in the possession of the prosecution."

"4. Whether it was reversible error to deny the request for production of the Senate investigator's summary where the testimony of the witness was secondary and largely admitted by the defendant making the request: where the testimony of the same witness before the Senate Committee was available to the defense and was used for impeachment purposes; and where the guilt of all the defendants was proved by overwhelming evidence from other sources."

The defendant in the *Lev* case submitted, among others, the following questions, which we copy from the *Lev* Petition for Certiorari, p. 3:

"6. Are not summaries and reports of prior statements made by witnesses to a government investigator available to the defendant under the provisions of Title 18 U.S.C., Section 3500?"

"7. Does Title 18 U.S.C. Section 3500 provide the sole procedure by which such summaries and reports are to be made available to defendants?"

Rubin, a co-defendant in No. 437, submits one of the questions involved as follows:

"(2) Whether the Court of Appeals was correct in designating the trial court's concededly erroneous ruling as 'harmless error' because of the enactment of the supervening statute enacted by Congress (18 U.S.C. Sec. 3500(a)(b)(e)(1)(2)) as an aftermath of the decision of the Supreme Court of the United States in *Jencks* v. *United States* (353 U.S. 657)."

The obvious differences between the *Lev* case and the *De Lucia* case are respectfully pointed up, briefly, as follows: In *De Lucia*

(a) The trial was had after *Jencks* and after § 3500 was enacted.

(b) The withheld document in *De Lucia* was in the possession of the prosecutor, it had been seen and signed, we believe, by the witnesses appearing at the trial.

(c) The document reflected the opinion of an expert witness, Stonesifer, who furnished his opinion before the trial jury concerning an important issue and which opinion, given at the trial, we believe, was contrary to the opinion expressed in the document.*

We respectfully submit that the circumstances of the *Lev* case may not squarely present the following questions, which questions we copy from our Petition for Certiorari, No. 745, in the *De Lucia* case:

(1) If § 3500 had not been enacted would it have been error for the Court to refuse to require delivery of the papers on the ground stated, *i.e.*, that they could have been of no value to the defense?

(2) If the answer to (1) is yes, the question arises, was it error to refuse, after application of § 3500?

(3) If it would have been error under the *Jencks* case and not error under § 3500, has Congress the Constitutional power to change the practice in the light of that decision?

(4) In view of the fact that the Government was obliged to prove the materiality of certain statements and the Court took this question from the jury by instruction, after an inspection *in camera,* does not this amount to conviction on evidence not heard or seen by petitioner?

No. 451, Rosenberg v. United States.

Your Honors limited the grant of certiorari to the following question which we copy from the Government Brief, p. 2:

"Is the rule of this Court in *Jencks* v. *United States*, 1957, 353 U.S. 657, a rule of mere procedure, or does

*We have not seen the document. We conclude from all of the circumstances of the case, including the refusal of the prosecutor to deliver it, that the document does in fact contradict the witness.

it involve a defendant's constitutional rights? May a clear violation of this rule be harmless error? May the conceded error of a trial court in withholding from defense counsel prior statements of principal Government witnesses be excused because a Circuit Court finds that the defense was not hampered in cross-examination of those witnesses? Is it proper for a Circuit Court to determine what use defense counsel might have made of statements erroneously withheld?"

We quote further from the Government Brief, p. 2:

"As phrased, this question assumes several matters which we dispute, such as a violation of the *Jencks* rule and an alleged conceded error. In our view, the questions presented are as follows:

1. Whether it was proper for the trial court to examine *in camera* documents produced by the United States Attorney to determine whether they were the kind of documents which should be turned over to the defense under *Jencks* or 18 U.S.C. 3500.

2. Whether petitioner should have been permitted to examine the statments of government witnesses prior to trial."

In the *De Lucia* case no demand before trial was made. The request for the document was made after the witnesses had taken the stand and had given their direct testimony. The prosecutor and the Trial Judge assumed that the document was the kind of document covered by 18 U.S.C. § 3500 and made use of the authority found by them in the statute, by virtue of § 3500, to deny the request for inspection.

Nos. 489 and 491, Pittsburg Plate Glass Co. v. United States. Galax Mirror Co. v. United States.

The question presented here to Your Honors involves the Grand Jury testimony of a Government witness.

The Attorneys for *Galax*, Brief p. 3, have put the question as follows:

> "Whether the denial of defendants' motion at the trial for production of the relevant grand jury testimony of the principal prosecution witness for purposes of cross examination constituted error?"

The Court of Appeals, 260 F. 2d 397, 402, said:

> "The defendants at no time requested the judge to make a preliminary inspection of the transcript to ascertain whether there was inconsistency. • • • it is now clear that the production of grand jury testimony is not governed by *Jencks* nor by subsequent legislation, nor 18 U.S.C.A. § 3500, but by the Federal Rules of Criminal procedure 6(e), 18 U.S.C.A. which vests discretion in the trial court. (citing cases) • • • (404) The Court did not exceed the proper limits of the sound discretion vested in it by Rule 6(e)."

The *De Lucia* case did not involve the denial of access to Grand Jury testimony.

No. 471, Palermo v. United States.

We copy the question presented from the Government Brief, p. 1:

> "Whether it was error to refuse to allow defense counsel to inspect and use for cross examination a memorandum written by Government agents who had conferred with a witness for the prosecution, where such memorandum had not been signed by or exhibited to the witness and was not a substantially verbatim, contemporaneous recording of what the witness had said?"

We quote further from the Government Brief, p. 16:

> "Under the statutory procedure, a summary of prior oral statements prepared by the Government Agents, and which has not been approved by the witness, is not a 'statement' which must be produced for cross examination of such witness."

In the *De Lucia* case the witnesses for the Government had taken the stand. We infer from the circumstances in evidence that these witnesses had executed the document withheld by the Court.

We respectfully submit the certiorari should be granted in the case at bar, before decision in the previous cases.

We respectfully submit that other questions have been submitted to Your Honors upon which certiorari should be granted, for reasons heretofore stated in our petition.

Respectfully submitted,

WM. SCOTT STEWART,
Attorney for Petitioner.

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vs.

UNITED STATES OF AMERICA

On petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

Petition for Rehearing

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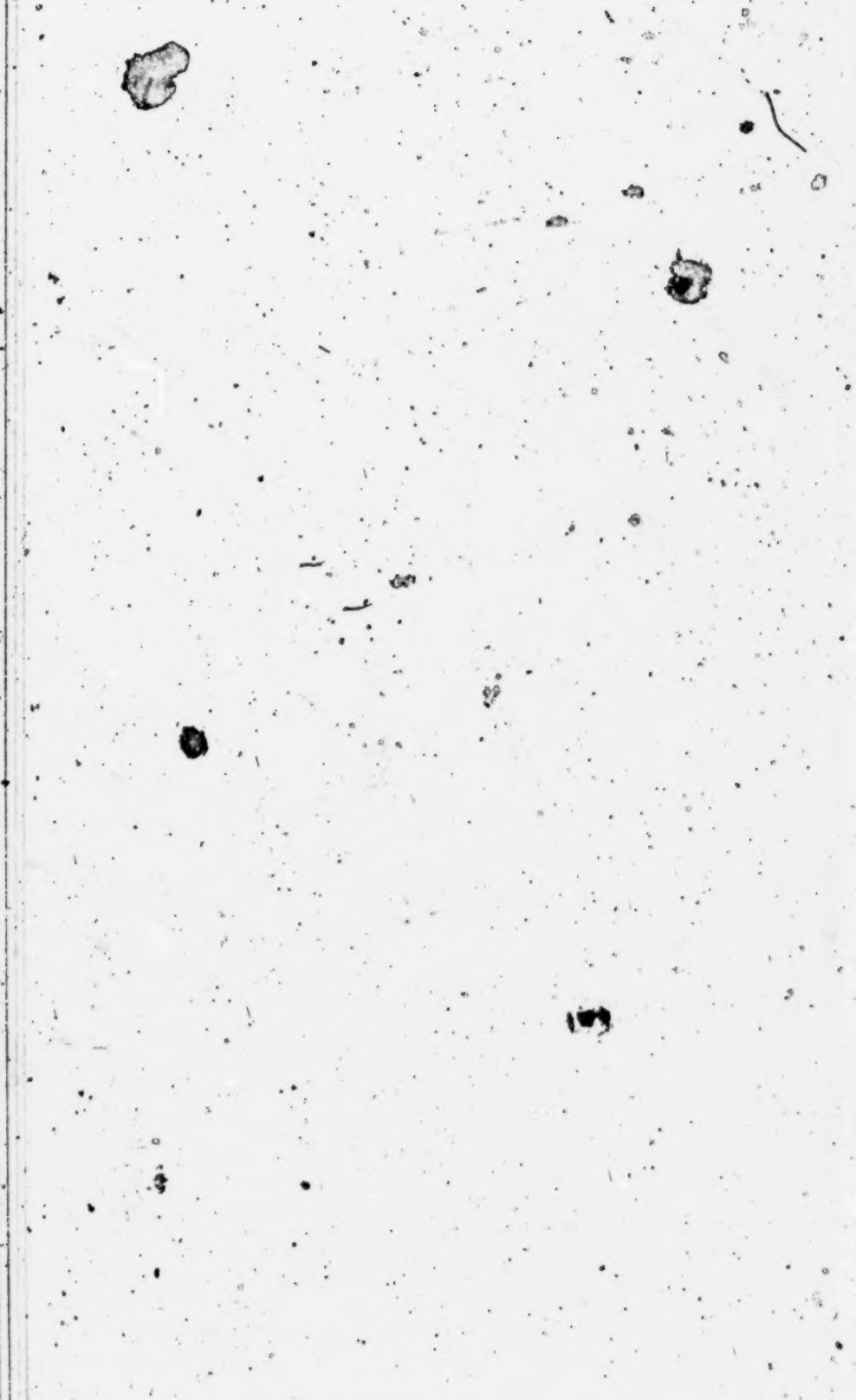

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vs.

UNITED STATES OF AMERICA

On petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

Petition for Rehearing

May It Please The Court:

Your Honors denied certiorari May 25, 1959. No indication was included to show the non-participation of any Justice of this Honorable Court. We telegraphed and wrote the Clerk of our intention to file this Petition for Rehearing, requesting that he withhold mailing a copy of the order of denial, or that he advise, if application for a stay to a Justice was required. The Clerk treated our telegram and letter as a motion for a stay. The Clerk pre-

sented them to Mr. Justice Clark. Mr. Justice Clark denied a stay. Whereupon we moved in the Court of Appeals for a stay, pending the disposition of this Petition for Rehearing. The Government has opposed our motion in the Court of Appeals upon the ground that Mr. Justice Clark previously denied our motion. Our motion for stay is now pending in the Court of Appeals. In the event that the Court of Appeals should refuse to stay its mandate, we have undertaken to advise the Clerk of this Honorable Court. We shall request that this petition be presented to a Justice of this Honorable Court in support of our motion for a stay of further proceedings, pending disposition.

It appears that Mr. Justice Clark has taken part in the consideration which resulted in denial of certiorari.

The record shows that during the term of Mr. Justice Clark as an Assistant Attorney General, DeLucia was prosecuted and convicted in New York. We quote from a footnote in our petition, p. 32:

> "Your Honors will take judicial notice of the record, printed copy on file in this Honorable Court, *United States* v. *Compagna, et al.* (including DeLucia) 146 F. 2d 524. Certiorari Denied, 324 U.S. 867."

Your Honors will note from 324 U.S. 867, that Mr. Justice Clark there appeared as an Assistant Attorney General. In the trial court the Government was represented by a Special Assistant to the Attorney General. That official appeared for the Government in *United States* v. *Compagna*, 146 F. 2nd 524.

In our petition for certiorari in the case at bar, we said, p. 32:

> "Agent Ruggaber (114) prepared his report from the printed transcript of a case in New York where DeLucia had been convicted."

After Compagna was released on parole, the Government sought to put him back in the penitentiary. Judge Underwood, in *Compagna* v. *Hiatt*, 100 F. Supp. 74, discharged Compagna, on the ground that the warrant had been issued arbitrarily. When this finding reached this Honorable Court, 340 U.S. 880, Your Honors noted that Mr. Justice Clark took no part. We assume that Mr. Justice Clark *sua sponte* recognized his duty to disqualify himself.

Concurrent with the procedure against Compagna and during the term of Mr. Justice Clark as Attorney General, a warrant was issued against DeLucia. In *United States ex rel. DeLucia* v. *O'Donovan*, 82 F. Supp. 435, Judge Igoe held that the warrant had been issued arbitrarily. This discharge was affirmed in *United States ex rel DeLucia* v. *O'Donovan, Marshal*, 178 F. 2nd 876. The Government petitioned Your Honors for certiorari. As appears from 340 U.S. 886, this petition was dismissed. Your Honors noted that Mr. Justice Clark took no part. Here again Mr. Justice Clark must have recognized that his previous association with this litigation should prompt him to disqualify himself.

From the various records, of which Your Honors take judicial notice, it will appear that after DeLucia had been granted parole, in the matter of this New York conviction, he became a football in a political maneuver, made by some of the Republicans to smear the Democrats.

Your Honors will find the reports of the Hoffman Committee printed as part of the record in 340 U.S. 886, No. 9788, Court of Appeals 7th Circuit, *United States ex rel DeLucia* v. *O'Donovan*, we quote, p. 107, 110, from the Report made by Congressman Porter Hardy, Jr.:

> "These attempts by the Chicago Tribune to discredit a Democratic administration, based on unsubstantial rumor, may of course inure to th benefit of a

> member or members of the Republican Party whom the Tribune supports. * * * The Chicago Tribune has sought to use this committee to serve its own private political hatreds and ambitions through baseless attacks on various public officials. It is well known as the medium for expressing the venom of its publisher toward any Democrat and the Democratic Party."

The record in the case at bar includes a printed copy of the proceedings of the Hoffman Committee (our petition p. 68). Mr. Justice Clark was included as one of the targets for this smear campaign and appeared as a witness before the Hoffman Committee.

The printed report (Brown cover) of HEARINGS BEFORE A SUB COMMITTEE OF THE COMMITTEE ON EXPENDITURES IN THE EXECUTIVE DEPARTMENTS, HOUSE OF REPRESENTATIVES, EIGHTIETH CONGRESS, SECOND SESSION, CLARE E. HOFFMAN, CHAIRMAN, was put in evidence below and is now before Your Honors. We quote from this report, p. 600:

> "Mr. Clark * * * But you will have to admit to me that there has been a series of stories, particularly in the Chicago papers, that have continually kept this thing sort of snowballing, by saying, 'Clark did this, Tom Clark did that, Clark is involved here, Clark did this.' Always insinuations and a lot of innuendo about Clark."

The prosecution of DeLucia in New York, the effort to put him back in prison for violation of parole, a deportation proceeding and this prosecution for income tax evasion, all constitute an effort on the part of the prosecuting officials to punish and get rid of petitioner. Mr. Justice Clark happened to be the chief law enforcement officer during a portion of this campaign. As is shown by the record before Your Honors much of the foundation for the present prosecution was laid by officials responsible to Mr. Justice Clark, in his then capacity as Attorney General.

Assuming that at this late day Mr. Justice Clark *sua sponte* determines to disqualify himself, Your Honors must then consider where that places the remaining members of this Honorable Court.

As was said by Mr. Justice Black in *In Re Murchison*, 349 U.S. 133, 136:

> "But to perform its high function in the best way 'justice must satisfy the appearance of justice'."

Also please see the comment by Mr. Justice Frankfurter in *Public Utilities Comm'n* v. *Pollak*, 343 U.S. 451, 466.

In view of the fact that this Honorable Court has granted certiorari in a number of cases involving questions raised by *Jencks* v. *United States*, 353 U.S. 657, our hope is that Your Honors will decide to take the case at bar, along with those cases. Mr. Justice Clark, as Your Honors know, dissented in *Jencks*.

We have a right to guess that in conference Mr. Justice Clark has taken a position contrary to that maintained by petitioner. Of course we have no way of knowing the degree of influence exerted by Mr. Justice Clark in conference. If Your Honors permit the denial of certiorari to stand, with the record showing the participation by Mr. Justice Clark, we respectfully submit that such decision will be a mistake, for reasons now apparent. We say this with all due respect to Mr. Justice Clark and assume that his previous connection with the case did not influence his opinion in the case at bar. We assume further that Mr. Justice Clark took part with no thought of his previous connection. The fact remains that Your Honors have denied certiorari with the participation of a Justice who should have disqualified himself. This fact alone should prompt Your Honors to grant a rehearing. Now that this petition has reminded Mr. Justice Clark of his

previous experience with this litigation, we assume that Mr. Justice Clark will request the proper procedure under the circumstances.

The intervening circumstances of substantial and controlling effect are as follows:

1. Our petition for certiorari was filed March 3, 1959.

2. Your Honors granted certiorari in Nos. 435-436-437, *Harry Lev, et al.* v. *United States* on December 8, 1958.

3. While the *Lev* case was pending our petition was on file and not called to the attention of Your Honors, for the reason that the Solicitor General, without objection, obtained continuances in our case.

4. The *Lev* case, and other cases reached the stage of oral argument. Still our case reposed in the office of the Clerk.

5. We examined the briefs filed in these other cases and endeavored to point out to Your Honors in a FURTHER REPLY that our case presents vital questions more squarely than these other cases.

6. Our FURTHER REPLY was filed on the same day that Your Honors denied certiorari in our case. We conclude that Your Honors did not have the benefit of our FURTHER REPLY and respectfully request its consideration in conjunction with this petition for rehearing. For convenience we have reprinted our FURTHER REPLY as an appendix to this petition.

7. We respectfully refer Your Honors to p. 5 of our FURTHER REPLY, where we have copied questions presented from our petition. To phrase them differently, we have presented the following questions.

A.

Whether a trial judge can make a ruling excluding evidence without letting the defendant know what the evidence is?

B.

Whether a trial judge can evaluate and construe a writing without affording the defendant an opportunity to see the writing and present his contentions concerning its admissibility?

Your Honors have granted certiorari since our petition was filed in cases touching upon the same questions. It is our respectful contention that the case at bar presents the questions more clearly. It is our contention that the Government would be unable to evade and defend in the manner shown by the Government briefs in the other cases.

Since the filing of our petition here the Court of Appeals has in *United States* v. *Davis*, 262 F. 2nd 871, 873, cited the case at bar, *United States* v. *DeLucia*, 262 F. 2nd 610, as authority for the proposition that §3500 is not unconstitutional. We submit to Your Honors that the case at bar presents the constitutional question more clearly than any of the cases in which Your Honors granted certiorari.

If Your Honors decide that §3500 is not unconstitutional, no doubt such decision will be based upon the theory that *Jencks* laid down rules of practice, within the field of Congressional power. In anticipation of the application of such theory, permit us to suggest that the case at bar presents the questions involved much better than any of the other cases in which Your Honors granted certiorari. In the case at bar, our petition p. 167, the Court of Appeals said:

> "The Court reviewed the memoranda *in camera* and correctly decided * * *."

The Court of Appeals made no further reference and did not include any hint as to what may have been contained in the withheld statement.

(a) In the courts below, the Government did not assert that the reports were privileged against disclosure on grounds of national security, confidential character of the reports, public interest or otherwise.

(b) The District Judge said clearly that if he thought the material would be of any value, he would have turned it over to the defense.

(c) The District Judge gave no description of the withheld matter. Those concerned are required to remain in the dark and trust to the judgment of the Trial Court.

(d) On the motion for new trial we requested that the Trial Court open the sealed envelope and spread the contents of record.

We quote from the transcript of proceedings p. 26, on file here before Your Honors, on June 12, 1958, showing the argument made to the District Court, on our motion for new trial.

> "Mr. Stewart: I am going to say lets not have any of that secret envelope stuff. * * * Give me a chance to argue from it now * * * not just make a guess or tell you what my information is.
>
> "I am making a suggestion. If that is something we shouldn't have had, lets have daylight on it. Lets spread it of record. Let me have a chance to argue that I should have had it."

In our brief submitted to Court of Appeals and certified here as a part of the record before Your Honors, we said, p. 37: (Emphasis added)

> "In the case at bar we are not dealing with to and from office communications concerning any outside witnesses. We would liked to have known if the

Agents were testifying to opinions in which they themselves had no confidence or belief. Agent Smith was not the only agent involved. We were confronted in the trial with opinions expressed by Agent Stonesifer (379) and Agent King (448). The opinions given by other experts, Ruggaber (245), Mahon (323) and Saldana (525) could have been tested, we believe, more intelligently if the material had not been withheld.

"*During our argument on motion for New Trial,* (642) *we requested that the reports withheld from us be opened and spread upon the record.* This request was opposed and refused. Now in this Honorable Court we are handicapped in presenting an argument concerning papers we have not seen. We respectfully suggest that the report made by Agent Smith should have been put in evidence as part of the case for the Government. The indictment charges the making of false statements on a material matter within the jurisdiction of the Revenue Service. It seems to us that the action taken by the Agents one way or another after having heard the statements, should have been germane. The Government having elected to withhold the report made by the Revenue Agents, we respectfully submit, that that strategy alone should have alerted the District Judge that justice required that the defense should have had the benefit of whatever the facts might have revealed. Without benefit of inspection of the withheld material, we can surmise that if the reports were of help to the Government and did not contradict its theory, the prosecutor would have delivered them. The District Court treated the matter as if we were offering the reports in evidence. Questions which may have arisen as to admissibility never arose. * * *

"The question presented in the case at bar is much broader than that considered in *Jencks*. The question here is . . . can the trial judge permit the prosecutor to withhold evidence in his possession which might assist the jury in determining vital issues. * * *

"By the Court: I think I will go as far as to say to you that almost all of the documents, I think all of the documents and particularly the long, long, long letter, were not the result of any investigation by any one agent nor do they apply to any particular act.

"(436) It is a discussion of the entire matter among themselves, a result of his discussions with different agents and their respective conclusions, which is all speculative.

"It is not subject to cross examination, hasn't any probative value, and I couldn't admit it if you had it before me. * * *

"By Mr. Barnett: (United States Attorney): * * * Whether or not the case was closed or not closed at any stage in the proceeding, to my mind has absolutely no relevancy in connection with the case that is here on trial.

* * *

"By the Court: I didn't want to say that because that might intimate that it was or was not in the files.* I didn't want to comment on it, but I agree with you that even if one agent should or did comment or express an opinion that it should or should not be prosecuted criminally, it wouldn't in the least affect this situation nor would it be admissible before the jury.

"By Mr. Barnett: That is our position, your Honor.

By the Court: I would exclude it.

By Mr. Stewart: Then I think your Honor has committed error, with all due respect. I think you have helped us with our record now.

By the Court: That is all right.

By Mr. Stewart: Thank you. * * *"

Your Honors will note from the various opinions rendered in the District Courts and in the various Courts of Appeal, wherein the defense has been denied inspection,

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* Your Honors will note the care taken by the District Judge to keep us in the dark concerning the contents of the withheld papers.

the court has described the withheld material, sufficiently to show that it was fair to withhold the material.

We illustrate with the following:

United States v. Grunewald, 162 F. Supp. 621.

Your Honors will note that Judge Herlands withheld certain papers. The District Judge described these papers sufficiently to show to the defense and to all concerned that the decision was fair and was based upon the law applicable.

United States v. Papworth, 156 F. Supp. 842

The District Court said:

> "But the F. B. I. agent's small note book contained much other confidential information, much of which was wholly unrelated to this case. The defendant has no right to examine such material."

As Your Honors will note, the District Court here made a finding that the withheld material was confidential. A review of such finding might be made *in camera*. Help in the way of argument from the defense lawyer may very well be not required. Your Honors may very well decide in some future case that it is only fair to conclude that a District Court has made a proper decision, subject to review, again *in camera*, by a Court of Appeals. When this conviction was affirmed in *Papworth* v. *United States*, 256 F. 2nd 125, 129, Your Honors will note that Judge Tuttle took pains to describe the withheld material, in order to show that no error had been committed.

United States v. Waldman, 159 F. Supp. 747

The District Court ordered the material to be turned over to the defense and said, p. 749

> "Finally in the 'statements' in question appear certain paragraphs, not purporting to be what the witness told the agent in detail, but which deal with some preliminary matters."

Your Honors will note that Judge Hartshorne gave some description of the withheld material.

Sells v. United States, 262 F. 2nd 815

We quote, p. 824

> "The excised portions do not relate to any issue presented in the trial. Without the excisions, there was the danger of harm to individuals who were not on time, who did not appear as witnesses, and who were in no way connected with the offense charged against Sells. The excisions properly and reasonably protected such individuals and in no way prejudiced the defendant."

Here again Your Honors will note that the Court of Appeals described the excised material, in order to show to the reader of the opinion that the denial had been made upon sufficient ground.

United States v. Palermo, 258 F. 2nd 397, Certiorari granted, 79 S. Ct. 296, No. 471.

We quote, p. 398

> "The trial court denied the request on the ground that the memorandum was not of the character which was required to be produced under the provisions of 18 U. S. C. A. Section 3500."

Your Honors will note that the Court of Appeals described the withheld material sufficiently to demonstrate that no error had been committed.

United States v. Spanglett, 258 F. 2nd 358

The trial court refused to deliver the Grand Jury testimony of a witness, Gaudin. After holding that *Jencks* and §3500 did not require delivery of Grand Jury testimony, the Court said, p. 341

> "However, now that we read Gaudin's grand jury testimony against his extended testimony on trial we do find one inconsistency."

Then, as Your Honors will note, the Court of Appeals proceeded to quote from the withheld Grand Jury testimony, in order to show that no injustice had been done, by reason of the ruling in the trial court.

Anderson v. United States, 262 F. 2nd 764.

Here, after the defendant had obtained all of the statements, the defense insisted that the file contained more. The judge looked through the file and reported that nothing further could be found. Your Honors could very well hold in some future case that it is not unfair to exclude defense counsel from any offer to help look through the files under the circumstances of this case.

United States v. Lev, 258 F. 2nd 9

This is one of the cases in which Your Honors granted certiorari. The case has been argued and is now under consideration. In all probability Your Honors are now working on opinions to be filed. The Court of Appeals found, p. 13, that the withheld summary was a written record made following the interview and is not substantially a verbatim record of the statement of the witness. It was held that the error, if any, in withholding, was harmless, because the withheld statement in a new trial wouldn't come under §3500. We are informed that whether or not this was fair procedure without permitting counsel for the defendant to participate is one of the questions before Your Honors.

United States v. Miller, 248 F. 2nd 163, 165

The withheld statement was, by stipulation, excluded from the record on appeal. The Court said,

> "Since we cannot know that failure to deliver the statement, properly excised, was prejudicial to the defendant, we do not think a new trial should be ordered."

The Court of Appeals said,

> "*Concededly* the statement contains some matter not related to the subject matter of Michel's testimony." (Emphasis added)

Of course if the defendant concedes that some of the material withheld does not relate to the subject matter, there is no need for the Court to set out, or describe, the withheld material.

United States v. Rosenberg, 257 F. 2nd 760

This is one of the cases in which Your Honors granted certiorari. We refer to this case in our FURTHER REPLY. Your Honors will find that Judge Hastie has described the withheld material, in sufficient detail to justify the action of the trial court. Whether or not the lower courts were in error, is a question before Your Honors. Our point is that the lower court judges described the withheld material. In the absence of such description, the practice of sealing up the withheld material amounts to denial of due process. It is our contention that the practice amounts to a Star Chamber proceeding.

In *Hormel* v. *Helvering*, 312 U.S. 552, 557, Mr. Justice Black said:

> "Rules of practice and procedure are devised to promote the ends of justice, not to defeat them."

Referring to this Honorable Court, Mr. Justice Black said that this Court:

> " * * * has been careful to point out the circumstances justifying the application of the practice in the particular case."

In *Cahill v. New York R. Co.*, 351 U.S. 183, 189, Mr. Justice Black dissenting, has collected the authorities for the following:

> " * * * this court has the entire record before it with the power to review the action of that court as well as direct such disposition of the case as that court might have done * * * "

We respectfully suggest that Your Honors direct the Court of Appeals to point out the circumstances justifying the application of the practice of an inspection *in camera*, to include a description of the matter withheld. In fairness, Your Honors could direct that the withheld matter be made available to counsel for petitioner, in order that further argument might be permitted before the Court of Appeals. Argument in which counsel has possession of necessary information. Counsel should not be required to argue while in the dark as to the contents of the withheld

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* Prior to argument before Your Honors in Nos. 435, 436, 437, **Harry Lev v. United States**, Mr. Anthony Bradley Eben, representing Lev, requested permission of the Clerk for leave to inspect the sealed material, in order to be in a position to argue the claimed error. The Clerk refused. In **United States v. Grunewald**, 162 F. Supp. 621, 626 the Court said:

> "The eight documents will, however, be preserved for possible availability to the Appellate Court. To that end the Court hereby directs the clerk to impound such documents and to keep them intact in a sealed envelope, subject only to the right of the prosecution to have photostatic copies made of said documents under the supervision of the clerk."

material. If it happened that the withheld papers were privileged against disclosure on the grounds of national security, confidential character of the reports, public interest, or otherwise, Your Honors might direct that the lower courts so find. But we have no such case here. We trust that upon rehearing, Your Honors will recognize the need of further rules in the interest of fairness. The whole procedure as now conducted must surely offend any sense of justice and be recognized here as contrary to the American way. It reminds one of Star Chamber proceedings. Your Honors are not only expressly empowered by statute (18 *U.S.C.* § 3771) to prescribe rules of pleading, practice and procedure in the field of criminal law, but Your Honors are also vested with a supervisory authority over the administration of criminal justice in the federal courts. *McNabb* v. *United States*, 318 U.S. 332, 341. Your Honors have expressed sensitive concern with such matters. *Mallory* v. *United States*, 354 U.S. 449, *Benanti* v. *United States*, 355 U.S. 96.

In *Cahill* v. *New York R. Co.*, 351, 183, 184 Your Honors said:

> "We deem our original order erroneous and recall it in the interest of fairness."

We assume that Your Honors are always interested in fairness. If a defendant is to be deprived of a statement, after inspection by the trial judge *in camera*, it is only fair that the record show in some way, for all to see, that the judge did not abuse his discretion, especially in cases where security is not involved. If *Jencks* is to be regarded as an order for a rule of practice, to be construed with § 3500, there still remains the need of additional guidance, if the application is to be fair, with adequate means of review. The case at bar presents these vital questions.

We were concerned with other points in our petition and neglected the argument now presented. The suggestions herein have been made after examination of the briefs filed in the cases wherein Your Honors have granted certiorari and after consultation with many of the lawyers for petitioners in those cases. In the opinion of some of these lawyers, Your Honors have indicated a division of opinion upon the questions involved. Permit us to respectfully suggest that the case at bar should be included before final decision is made on the other cases. For some of our reasons please see our FURTHER REPLY (Blue cover) now on file in this Honorable Court.

In *Needelman* v. *United States*, 261 F. 2nd 802, decided November 4, 1958, it appears that the petition for rehearing was reached on January 5, 1959. The Court noted, p. 807, that Your Honors had granted certiorari in the cases referred to in our FURTHER REPLY. (*Lev* v. *United States*, Nos. 435, 436, 437 *et al*,) the Court ordered that the parties might show cause why the Court should not await the decision of one or more of those cases by Your Honors, before the Court of Appeals rules on the petition for rehearing.

If by the grant of certiorari we are permitted to brief this matter of fairness in practice, we hope to be able to contribute to the continuance of the effort of Your Honors to see that justice is done according to law. In *Cone* v. *West Virginia Paper Co.*, 330 U.S. 212, 215, Your Honors noted that in three cases certiorari had been granted to consider a point, but Your Honors failed to reach the point, because of the nature of the cases presented. Unless we are granted a rehearing it may be that the same thing will

happen here. Your Honors have granted certiorari in a number of cases in which questions squarely presented in the case at bar may never be reached, because of the circumstances of those cases.

Your Honors must know that *Jencks* and § 3500 introduced a novel situation. In *Jencks* Your Honors were concerned with an effort to be fair. Your Honors must know that any change in rules must be tested by experience, with the help of lawyers engaged in operating under the rules. With all due respect, we seek the opportunity to offer our suggestions. The case at bar presents a record upon which such suggestions can be founded.

A few days before the brief for the Government was due Mr. William A. Barnett, the Assistant District Attorney who had tried the case and who had argued it in the Court of Appeals, asked us if we had any objection to a thirty day continuance, in the matter of the Government brief in opposition here. We said no. Later we received notice from the Clerk that the extension had been granted. Then, as the time for filing aproached under the extension, Mr. Barnett again asked if we had any objection to a further extension. We said no. In a few days we received another notice from the Clerk to the effect that this second extension had been granted. There has been no indication that these motions for extension had ever been called to the attention of this Honorable Court or to any Justice thereof.

At the time of our consents we did not know of the granting of certiorari by Your Honors in Nos. 435, 436, 437, *Harry Lev* v. *United States* and other cases mentioned in our FURTHER REPLY. If we had known of these other cases we would have objected or in some manner called the attention of Your Honors to the fact that the case at bar included questions similar to those upon which certiorari

had been granted. Now, at this late day, we have made an examination of the Rules. As Your Honors know, Rule 24 provides that the Clerk may enlarge the time under the provisions of paragraph 5 of Rule 34. If we understand paragraph 5, the Clerk is authorized to grant but one extension, agreed upon, provided that the Clerk is of a certain opinion. We quote the last sentence of paragraph 5:

> "All other requests for extension of time for filing briefs shall be referred to the court or a justice thereof."

We respectfully submit that when the Solicitor General applied to the Clerk for the second continuance the Clerk had exhausted his jurisdiction and power. Therefore the Clerk should have referred the application to this Honorable Court or a Justice. In such event, Your Honors, knowing that certiorari had been granted in the other cases, may have denied the application for further extension, or the extension may have been granted and in such event Your Honors may have taken our case with the other cases.

By letter, we submitted our construction of the Rules to the Clerk and have received reply as follows:

> "In checking the records and files in this case we find that there was no irregularity in according the government two extensions of time to file the brief in opposition to the petition inasmuch as it appears that you acquiesced in the extension."

Evidently the Clerk has construed the Rules to give him authority to grant any number of extensions, if there be acquiescence. Even if the Clerk has correctly construed the Rules, it must surely be that Your Honors have jurisdiction to review the matter and to determine if the Clerk was warranted in forming an opinion that the extension, (Rule 35, ¶ 5)

> "• • • would not prejudicially delay the disposition of causes not set for argument or impede the progress of the argument calendar • • •"

Surely there must be implied in the Rules a provision that if the Clerk has reason to believe that the requested extension will have the effect of dividing cases, which belong together, to the prejudice of a party, the facts, including the fact that certiorari had been granted in like cases, should be called to the attention of this Honorable Court, or a Justice thereof.

We seek to lock the barn after the horse has been stolen, we know, but if we understand the function of a petition for rehearing, it includes matters such as this. As Your Honors said in *Jencks* v. *United States*, 353 U.S. 657, 668:

> "For the interest of the United States in a criminal prosecution • • • is not that it shall win a case, but that justice shall be done • • •" *Berger* v. *United States*, 295 U. S. 78, 88."

We assume that this interest of the United States includes the practice of the Solicitor General, as assisted by the Attorney General and the various District Attorneys.

We refer Your Honors to a group of cases, reported in 260 U.S. 695. After the defendants had been convicted in Illinois, they made an attack upon the indeterminate sentence law. After this Honorable Court granted certiorari in one of these cases and pending decision, this Honorable Court, or a Justice thereof, allowed bail to convicted defendants serving time in the State Penitentiary and grouped the cases, pending the outcome of the main, or first case. We mention this history to show some of our reasons for believing that in the determination of whether certiorari should be granted, it has been the policy of this

Honorable Court to grant the writ, after it had been granted in a previous case involving the same question. This policy evidently was carried out after Your Honors granted certiorari in Nos. 435, 436, 437 *Lee* v. *United States*. Your Honors, more or less as a matter of routine, then granted certiorari in the other cases mentioned in our FURTHER REPLY. If the Solicitor General had not obtained the extensions, our case may have been taken with the others. We trust that Your Honors do not blame us for calling that official to strict account. The Government officials appear to us as demanding a pound of flesh. We point to the contract, as embodied in the Rules. The merchant of Venice agreed to the contract, but Portia was able, at a late day, to find a defense, in her request for strict application of the rules. All of this includes the assumption that judges seek to do justice.

Upon reconsideration we trust that Your Honors will grant certiorari in order that we may be heard further on these important questions, in the light of whatever Your Honors might conclude in the other cases.

Respectfully submitted,

WM. SCOTT STEWART
Counsel for Petitioner

CERTIFICATE OF COUNSEL

Wm. Scott Stewart, counsel for petitioner, hereby certifies that this petition for rehearing is presented in good faith and not for delay. This petition is restricted to the grounds specified in Rule 58.

WM. SCOTT STEWART
Counsel for Petitioner

APPENDIX

APPENDIX

FURTHER REPLY

to Goverament's Brief in Opposition

May It Please The Court:

Fearing that our petition for certiorari might have been presented without it, we hurriedly submitted our "Reply to Government's Brief in Opposition". We believed it important that Your Honors be reminded of other cases recently argued. Cases involving the *Jencks* case rule. Since the filing of our Reply we have examined the briefs in some of those cases and now beg leave to present this further reply, in order to prevail upon Your Honors, if possible, to include the case at bar in the matter of interpretation of the law applicable. As may be expected each case coming to Your Honors presents its own factual background. It is our respectful contention that the Government has been able to defend its position in each of the other cases, because of facts in those cases not present in the case at bar. We submit that the *De Lucia* case presents questions squarely, which questions require an answer, sooner or later, for the guidance of the lower courts. The trial Judge said, after an examination of the withheld document, that if he thought it would do us any good he would order its delivery. The trial Judge undertook to decide upon the value of the withheld document. Please again see our petition for certiorari, pp. 136 to 146. We do not believe that the right of any trial judge to do this has been as squarely presented in any of the other cases argued before Your Honors.

In *Holland* v. *United States*, 348 U.S. 121, 124, Mr. Justice Clark said, concerning previous cases:

> "We have denied certiorari because the cases involved only questions of evidence and, in isolation, presented no important questions of law."

Your Honors will agree no doubt, that case should not be decided in isolation, especially where other cases are on the docket. The Government Attorneys should not be allowed to divide and conquer if any such motive was present in their requests for continuances in the case at bar. To divide may be good strategy, if it were the duty of the Government Attorneys to win at all costs. But as Your Honors have said in *Jencks*, 353 U.S. 657, 668, quoting from *Berger*:

> "For the interest of the United States in a criminal prosecution is not that it shall win a case but that justice shall be done."

In the case at bar important questions have been presented concerning what might constitute justice. A number of cases have been presented and argued before Your Honors involving related questions. We respectfully submit that the case at bar should be included, before Your Honors reach a decision in the previous cases.

We respectfully submit the following observations concerning the previous cases, in support of our contention that the case at bar should be included by Your Honors in the group, before final decision.

Nos. 435-436-437, Harry Lev v. United States.

The record shows that at the time of the trial the prosecutor did not have in his possession the document made the subject of controversy before Your Honors. The case was tried before *Jencks*. After it reached the Court

of Appeals the prosecutor submitted an affidavit in that court, including the controversial statement, which statement was submitted to the Court of Appeals *in camera*. The Government before Your Honors has argued that the error, if any (of non production at trial), was harmless under the circumstances of the case. The Government has put the question, in part, as follows, p. 3, Brief on the merits:

> "3. Whether it was error, under *Jencks* v. *United States*, 353 U.S. 657, for the trial court to deny the request of one defendant for production of what proved to be the summary of a Senate investigator's interview with a witness, where the document had not been seen or approved by the witness and was not then in the possession of the prosecution."
>
> "4. Whether it was reversible error to deny the request for production of the Senate investigator's summary where the testimony of the witness was secondary and largely admitted by the defendant making the request; where the testimony of the same witness before the Senate Committee was available to the defense and was used for impeachment purposes; and where the guilt of all the defendants was proved by overwhelming evidence from other sources."

The defendant in the *Lev* case submitted, among others, the following questions, which we copy from the *Lev* Petition for Certiorari, p. 3:

> "6. Are not summaries and reports of prior statements made by witnesses to a government investigator available to the defendant under the provisions of Title 18 U.S.C., Section 3500?"
>
> "7. Does Title 18 U.S.C. Section 3500 provide the sole procedure by which such summaries and reports are to be made available to defendants?"

Rubin, a co-defendant in No. 437, submits one of the questions involved as follows:

"(2) Whether the Court of Appeals was correct in designating the trial court's concededly erroneous ruling as 'harmless error' because of the enactment of the supervening statute enacted by Congress (18 U.S.C. Sec. 3500(a)(b)(e)(1)(2)) as an aftermath of the decision of the Supreme Court of the United States in *Jencks* v. *United States* (353 U.S. 657)."

The obvious differences between the *Lev* case and the *De Lucia* case are respectfully pointed up, briefly, as follows: In *De Lucia*

(a) The trial was had after *Jencks* and after § 3500 was enacted.

(b) The withheld document in *De Lucia* was in the possession of the prosecutor, it had been seen and signed, we believe, by the witnesses appearing at the trial.

(c) The document reflected the opinion of an expert witness, Stonesifer, who furnished his opinion before the trial jury concerning an important issue and which opinion, given at the trial, we believe, was contrary to the opinion expressed in the document.*

We respectfully submit that the circumstances of the *Lev* case may not squarely present the following questions, which questions we copy from our Petition for Certiorari, No. 745, in the *De Lucia* case:

(1) If § 3500 had not been enacted would it have been error for the Court to refuse to require delivery of the papers on the ground stated, *i.e.*, that they could have been of no value to the defense?

(2) If the answer to (1) is yes, the question arises; was it error to refuse, after application of § 3500?

* We have not seen the document. We conclude from all of the circumstances of the case, including the refusal of the prosecutor to deliver it, that the document does in fact contradict the witness.

(3) If it would have been error under the *Jencks* case and not error under § 3500, has Congress the Constitutional power to change the practice in the light of that decision?

(4) In view of the fact that the Government was obliged to prove the materiality of certain statements and the Court took this question from the jury by instruction, after an inspection *in camera*, does not this amount to conviction on evidence not heard or seen by petitioner?

No. 451, Rosenberg v. United States.

Your Honors limited the grant of certiorari to the following question which we copy from the Government Brief, p. 2:

> "Is the rule of this Court in *Jencks* v. *United States*, 1957, 353 U.S. 657, a rule of mere procedure, or does it involve a defendant's constitutional rights? May a clear violation of this rule be harmless error? May the conceded error of a trial court in withholding from defense counsel prior statements of principal Government witnesses be excused because a Circuit Court finds that the defense was not hampered in cross-examination of those witnesses? Is it proper for a Circuit Court to determine what use defense counsel might have made of statements erroneously withheld?"

We quote further from the Government Brief, p. 2:

> "As phrased, this question assumes several matters which we dispute, such as a violation of the *Jencks* rule and an alleged conceded error. In our view, the questions presented are as follows:
>
> 1. Whether it was proper for the trial court to examine *in camera* documents produced by the United States Attorney to determine whether they were the kind of documents which should be turned over to the defense under *Jencks* or 18 U.S.C. 3500.

2. Whether petitioner should have been permitted to examine the statements of government witnesses prior to trial."

In the *De Lucia* case no demand before trial was made. The request for the document was made after the witnesses had taken the stand and had given their direct testimony. The prosecutor and the Trial Judge assumed that the document was the kind of document covered by 18 U.S.C. § 3500 and made use of the authority found by them in the statute, by virtue of § 3500, to deny the request for inspection.

Nos. 489 and 491, Pittsburgh Plate Glass Co. v. United States, Galax Mirror Co. v. United States.

The question presented here to Your Honors involves the Grand Jury testimony of a Government witness. The Attorneys for *Galax*, Brief p. 3, have put the question as follows:

"Whether the denial of defendants' motion at the trial for production of the relevant grand jury testimony of the principal prosecution witness for purposes of cross examination constituted error?"

The Court of Appeals, 260 F. 2d 397, 402, said:

"The defendants at no time requested the judge to make a preliminary inspection of the transcript to ascertain whether there was inconsistency. • • • it is now clear that the production of grand jury testimony is not governed by *Jencks* nor by subsequent legislation, nor 18 U.S.C.A. § 3500, but by the Federal Rules of Criminal procedure 6(e), 18 U.S.C.A. which vests discretion in the trial court. (citing cases) • • • (404) The Court did not exceed the proper limits of the sound discretion vested in it by Rule 6(e)."

The *De Lucia* case did not involve the denial of access to Grand Jury testimony.

No. 471, Palermo v. United States.

We copy the question presented from the Government Brief, p. 1:

> "Whether it was error to refuse to allow defense counsel to inspect and use for cross examination a memorandum written by Government agents who had conferred with a witness for the prosecution, where such memorandum had not been signed by or exhibited to the witness and was not a substantially verbatim, contemporaneous recording of what the witness had said?"

We quote further from the Government Brief, p. 16:

> "Under the statutory procedure, a summary of prior oral statements prepared by the Government Agents, and which has not been approved by the witness, is not a 'statement' which must be produced for cross examination of such witness."

In the *De Lucia* case the witnesses for the Government had taken the stand. We infer from the circumstances in evidence that these witnesses had executed the document withheld by the Court.

We respectfully submit the certiorari should be granted in the case at bar, before decision in the previous cases.

We respectfully submit that other questions have been submitted to Your Honors upon which certiorari should be granted, for reasons heretofore stated in our petition.

Respectfully submitted,

WM. SCOTT STEWART,
Attorney for Petitioner.